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Supreme Court of the United States.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
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JAMES H. MCKENNEY,
Clerk

JOSEPH RALPH BURTON,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

No. 539.

In Error to the Circuit Court of the United States, for the Eastern District of Missouri.

Statement, Brief and Argument for Plaintiff in Error.

JOHN F. DILLON,
HARRY HUBBARD,
W. H. ROSSINGTON,
W. KNOX HAYNES,
F. W. LEHMANN,
For Plaintiff in Error.

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STATEMENT, BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

THE PROCEEDINGS.

The indictment was returned by the Grand Jury of the Circuit Court on the 10th day of November, 1905, and contained eight counts.

On the 14th of November, 1905, the defendant demurred to the indictment and to its several counts. The prosecutor

on the 15th day of November dismissed the case as to the fourth and fifth counts, and thereafter on the same day the demurrrer was overruled.

On the same day the defendant filed a plea in bar as to the third and seventh counts of the indictment.

On the 16th day of November the plaintiff filed a replication to the plea in bar and the defendant moved to strike it from the files. Upon motion of the District Attorney, the replication was withdrawn with leave to file an amended replication.

On the 17th of November an amended replication was filed.

On the 18th of November a demurrer to the replication was filed, argued and overruled, and judgment denying the plea was entered against the defendant.

On the same day the defendant entered his plea of not guilty.

The trial of the case was begun on the 20th of November, and continued from day to day until and including the 25th day of November, when a verdict was returned finding defendant guilty on all the remaining counts of the indictment.

On the 27th day of November the defendant filed a motion for new trial, which was overruled on the 29th of November. On the last named day a motion in arrest of judgment was filed, and on the same day overruled.

On the 29th of November the Court entered judgment upon the sixth count of the indictment, sentencing defendant to six months' imprisonment in the county jail of Iron County, Missouri, and imposing a fine of two thousand dollars, and entered judgment upon the seventh count of the indictment, sentencing defendant to six months' imprisonment in the same jail, the term to begin and run concurrently with the first term of imprisonment, and imposing a fine of five hundred dollars. And it appearing that the first, second and eighth counts of the indictment cover the same

transaction and offense embraced in the sixth count, and that the third count covers the same transaction embraced in the seventh count, it was ordered that no judgment or sentence be pronounced upon the first, second, third, and eighth counts.

On the same day, the 29th of November, a bill of exceptions was allowed and made a part of the record of the cause, a petition for a writ of error, accompanied by assignments of error, was presented, the writ of error was allowed, citation issued and all the steps essential to perfect the appeal taken.

THE INDICTMENT.

The indictment is founded upon section 1782 R. S. U. S., which is as follows, viz:

Upon Taking Compensation in Matters to which United States is a Party.

> "No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction thereof, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States."

As submitted to the jury, the indictment contained six counts.

The first, second, sixth and eighth counts were intended to charge and cover the same transaction and the same offense, that of agreeing, on the 18th of November, 1902, to receive compensation for services to be rendered by the defendant while a Senator of the United States, in a proceeding pending before a Department of the United States.

The third and seventh counts were intended to charge and cover the same transaction and the same offense, that of receiving, on the 26th day of March, 1903, compensation for services rendered while a United States Senator, in a proceeding pending before a Department of the United States.

The rendition of service and receipt of compensation therefor, charged in the third and seventh counts of the indictments, were in pursuance and performance of the agreement alleged in the first, second, sixth and eighth counts.

THE SIXTH COUNT.

The sixth count (Rec. p. 11) charges that:

During the time involved the defendant was a Senator of the United States from the State of Kansas.

The Rialto Grain and Securities Company, a corporation, was pretending to carry on the business of a broker in grain and securities on its own account and as agent for others, and of making speculative investments in such commodities, with its principal offices in St. Louis, Missouri.

There was pending before the Post Office Department and before the Postmaster General a proceeding in which the United States was indirectly interested, to determine whether the Rialto Company was engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, and whether the Postmaster General, should issue a fraud order against the company.

The defendant, on the 18th of November, 1902, at the City of St. Louis, Missouri, knowing this proceeding to be pending, agreed with the Rialto Company to receive from

it twenty-five hundred dollars as compensation for appearing before the Post Office Department, the Postmaster General, the Chief Post Office Inspector, the Assistant Attorney General for the Post Office Department, and other officers of the Post Office Department, as agent and attorney for the Rialto Company, and obtaining information for the Company concerning the proceeding before mentioned, and by the influence of his presence and of his office as Senator, and by statements, representations and persuasion inducing the Postmaster General to believe that the Rialto Company was not conducting any such fraudulent scheme as that mentioned and to put a stop to any further investigation of the matter, and to refrain from determining it adversely to the Company, and from issuing a fraud order.

The other counts of the indictment charging an agreement to receive, it is not necessary to set out, as they involve no questions not presented by the sixth count.

THE SEVENTH COUNT.

The seventh count (Rec. p. 13) charges that the defendant, being at the time involved a Senator of the United States from the State of Kansas, did, on divers days between the 18th day of November, 1902, and the 26th day of March, 1903, render the services described in the sixth count before the Postmaster General of the United States and the Post Office Department, the same being, as he well knew, services in relation to the proceeding described in the sixth count, and did receive from the Rialto Company five hundred dollars as compensation for such services.

The third count is also for receiving compensation, and it is not necessary to set that out.

THE DEMURRER.

The defendant (Rec. 17) demurred to the indictment,

To all the counts because: (1) the alleged proceeding be-

fore the Postal Department was not one in which the United States was interested, or to which it was a party; (2) they failed to state facts showing any offense by the defendant; (3) they did not inform the defendant of the nature and cause of his accusation; (4) they stated no facts showing that there was any proceeding pending before the Postal Department; and (5) they did not state what services were rendered, or that he agreed to render any services whatever.

To the sixth and related counts that they fail to show, that the defendant agreed to render the services mentioned, or that he knew when making the agreement that the services to be rendered or required of him were to consist of the acts or things mentioned, or that the defendant knew that any of the acts to be done as alleged in the indictment would or could influence the action of any official of the Department.

To the third and seventh counts that they fail to aver that any services were rendered by the defendant, or that anything done by him was intended or calculated to influence the action of any official of the Postal Department.

THE PLEA IN BAR.

The plea in bar (Rec. 20) was to the third and seventh counts of the indictment. It alleged a former trial and acquittal of the defendant upon an indictment covering the same transaction and the same offense. The details of the plea are not necessary to be set out further at this time than that as to the receipt of the money the first indictment alleged that the defendant "did receive Five Hundred Dollars from one W. D. Mahaney, an officer and employe of the Rialto Grain and Securities Company as compensation, etc.," and it is alleged that this act of so receiving the money is the same identical act and transaction and the same identical means of payment charged and intended to be charged in the indictment in the case at bar.

THE REPLICATION.

The replication (Rec. 24) alleges that in the first indictment there were three counts with respect to this transaction. In the first two counts the charge was that the defendant accepted and received the money from the Rialto Grain and Securities Company, and in the third the charge was that the defendant accepted and received the money from one W. D. Mahaney, an officer and employe of the Company. In each count it was alleged that the money was received as compensation for services rendered to the Rialto Grain and Securities Company. The replication charges that the defendant was convicted on the first two counts of the original indictment, that he prosecuted an appeal therefrom, and that the conviction was reversed and a new trial granted.

DEMURRER TO THE REPLICATION.

The defendant demurred to this replication as insufficient to preclude him from his plea, and it being agreed that the question arising upon the plea and replication was one of law, the Court passed upon it as such, and denied the plea.

THE TESTIMONY.

Upon the trial of the case the testimony showed the following facts:

The Brooks Brokerage and Commission Company.

Prior to June, 1902, there existed in St. Louis the Brooks Brokerage and Commission Company, which was owned and controlled by one Charles H. Brooks.

Hugh C. Dennis, familiarly known as Major Dennis, was a resident of St. Louis at the time, and was the General Agent of the Hartford Life Insurance Company for the States of Missouri, Arkansas and Texas.

Dennis, in the month of June, 1902, acquired the interest of Brooks in the Brokerage Company, but committed the conduct of its affairs to one E. C. Walden, who had been Secretary of the Company under the Brooks management, Dennis continuing in his Life Insurance business.

Brooks' Attacks Upon Dennis.

About the 27th of July, Mr. Brooks, who was then in California, wired Dennis to the effect that he would take a half interest in the business, back it with credit of $50,000, and add new features. This proposition was declined by Major Dennis, whereupon Brooks immediately came to St. Louis, bringing a lawyer with him, and started a so-called collection agency for the purpose of organizing a fight against Dennis and compelling him to take him back into the company, or to blackmail him out of a large amount of money. This precipitated a series of law suits against Dennis, and to obviate further trouble, Dennis wound up the business of the Brooks Brokerage Company, and organized

The Rialto Grain and Securities Company.

about the first of September, 1902. The company was owned by Major Dennis and was organized under the legal direction and advice of Judge Chester H. Krum and Thomas B. Harlan, who were, from the date of its organization and during the entire time here involved and long thereafter, counsel of the company. The purpose of this company was to deal in grain, provisions and securities.

The controversies between Brooks and Dennis brought about an

Investigation of the Brooks Company.

by the Federal authorities. Dennis insisted that he was innocent of all wrong, and that whatever was illegal in the

business was the work of Brooks and Walden. He aided the investigation and turned over all the books and papers to the authorities, but as he had been the owner of the concern for a portion of the time, he was apprehensive that an indictment might be found against him, which would be extremely hurtful alike to him and to the Rialto Grain and Securities Company. He prepared therefore to meet the situation. (Rec. pp. 112 and 113.)

The Employment of Burton.

There was an advertising agency in St. Louis, H. W. Kastor & Sons, which had done business for the Rialto Company, and which had also had some business relations with Senator Burton. The manager of this agency, as an act of friendship to Senator Burton, had recommended him to Major Dennis as a suitable man for counsel in his troubles, and Dennis had directed one of his local attorneys to engage him.

Senator Burton was a total stranger to Major Dennis, and knew nothing of any of the matters before stated until coming to St. Louis on the 17th of November, 1902, when he met Kastor on business of his own, and was told by Kastor that he had a client for him.

Introductions followed, but Senator Burton was about to take the train for Chicago, and Mr. Harlan went with him for the purpose of a conference. The business of the Senator with Kastor not having been concluded, Kastor also went along.

The Agreement with Harlan.

The conference between Mr. Harlan and Senator Burton respecting the employment of the latter was had on the train in Illinois, between the cities of St. Louis and Chicago.

In this conference, Major Dennis and the Rialto Company were considered as one. The apprehended indictment was

the matter of immediate urgency, and was discussed in its various phases.

With the indictment out of the way, Major Dennis designed to engage in the sale of securities on a popular plan, viz: Having the bonds of railroad and other companies issued in small denominations and taken by persons of modest means. This matter was discussed at great length, and the ability and the opportunities of Senator Burton to aid in its realization through his Eastern acquaintances and connections, were all entered into. It was understood that other matters might arise as to which the advice and assistance of Senator Burton would be desired.

As to compensation, a salary of five hundred dollars per month was suggested, but Senator Burton stated that as the criminal case against Major Dennis would be the first thing to come on, he would not care to engage for that sum if his employment was to cease as soon as that was disposed of, and that the employment should therefore run for at least five months. This was all assented to as reasonable by Mr. Harlan, who added that the employment would not terminate with the five months unless the Senator terminated it. He however could conclude nothing, but would consult Dennis. Nothing was said as to the time of the commencement of the service.

Scope of the Employment.

The contemplated engagement was talked of and treated as a general engagement as counsel for the Company with special reference to the apprehended indictment, and the popular plan of placing securities.

In connection with the suggestion that the employment of Senator Burton should be as general counsel for the Company, he inquired, in view of the investigation of the Brooks Brokerage Company, whether the Rialto Company had any trouble with the Postal Department. He was as-

sured that it had not, and could not have. That the Company was organized under the direction of Judge Chester H. Krum and Mr. Harlan, and was violating no law, State or Federal, and did not intend to. Senator Burton was explicit that he would accept no employment inconsistent with his position as Senator, that he would try no case before the Department, nor undertake to influence the Department in any way, and that if the Company got into trouble with the Department, he would resign as its counsel. Mr. Harlan in turn gave positive assurance that there would be no trouble of this kind, and that they proposed to meet the Department by keeping on the right side of the law.

The only testimony as to what occurred during this conference on the train is that of Mr. Harlan and Senator Burton, and we have given its substance. (Rec. pp. 126-132 and 230-235.)

The Agreement Concluded.

Senator Burton went from Chicago to Washington, and Mr. Harlan returned to St. Louis. Harlan conferred with Dennis, and on the 18th sent a telegram to Senator Burton, which is not in evidence. On the same day he wrote a letter, which, among other things confirmed the telegram in the following terms, viz: "I hope you received my message to the effect that this Company accepts your terms to act as counsel at a salary of $500.00 per month, *said services to begin immediately; that is of this date, November 18th,* 1902." Senator Burton responded to this, writing from Washington on the 20th of November: "In return if agreeable you may make remittance for my first month's pay." (Rec. 112-114.)

The Situation as to Dennis.

Harlan's letter, after confirming the telegraphic message accepting the terms of employment and stating the begin-

ning of the term of service, enters into a resume of the situation as it involved the apprehended indictment of Dennis, and concludes, "I do not know what reports have been sent into the Post Office Department at Washington, nor am I prepared to say that the Government intends to make a case against Major Dennis; but if you can find it convenient to inquire of these facts at the Department, you may be able to perform for us a great service at this time. Should any action be taken here by the Grand Jury, I will wire you at once." (Rec. 112.)

The Situation as to the Rialto Company.

There had been no suggestion up to this time to Senator Burton that there had been any complaints made against the Rialto Company in the Postal Department, or that the Company was in any manner involved in the Department, and every assurance had been given by Harlan that there would be nothing of the sort. The trouble on account of the Brooks Brokerage Company was existent, and had given rise to Senator Burton's inquiries as to whether the Rialto Company might possibly become involved.

Houts and Evans Complaints.

As a matter of fact, two complaints had been made against the Rialto Company, one on October 28th by Bella Evans, of Albany, New York, saying that she had sent thirty dollars for investment and had gotten no acknowledgment of receipt, and that the Company had refused to answer her letters. The other was by Mrs. K. C. Houts, on October 30th, charging that the Rialto Company "have swindled me in the sum of $50 sent them. They made false quotations and utterly ignored my instructions and my demands for the return of my money. They utterly refused to answer my letters. They sent a slip of paper

inclosed in one of their letters, stating that if I returned same with remittance they would guarantee me six hundred per cent within ten days on December corn." (Rec. 48-51.)

Senator Burton was not advised of these complaints in his conference with Harlan. He knew nothing of them at all until he called at the Department on November 20th, and then was informed only that these persons had made complaint, without being advised as to the nature of the charge.

These were the only complaints charging actual fraudulent conduct ever made against the Rialto Company up to the time that Burton's connection with it ceased. None had been made before, and none other were made, if ever, until after Burton had terminated his relations with the Company.

Other Complaints.

There were some other letters sent in subsequently, and prior to March 26th, 1903, but these simply transmitted circulars and booklets of the Company, with the suggestion that a bad business was indicated by them. An example is the letter of Sarah A. Warner, written in January, 1903, in which she says, "the business is not one whit more respectable than the bucket shop, and is more injurious than the latter. I have not been taken in, but as a farmer, one of the most unfortunate classes of American citizens, I wish to protest against the whole gamble in grain and food stuffs, which injures the whole country, us poor farmers first and benefits none." (Rec. 66-67.) Mrs. Warner was decidedly opposed to all speculative dealing, but the defendant was not informed and never knew anything of her protest or of the similar protests of Allen and Fravel.

He knew only that Mrs. Evans and Mrs. Houts had made some kind of complaint, and did not know this until November 20th.

Action on Houts and Evans Complaints.

The Houts and Evans letters were sent to the Inspector in charge at St. Louis on November 7th, 1902, in the regular routine course, were received in St. Louis in due course of mail, the complaints investigated by the field inspector on November 14th, and reported by him on that day to the inspector in charge as unwarranted. (Rec. 229.)

The Rialto Company was advised in some way of this report, for when on November 20th the defendant wrote to Harlan, saying he was advised that these parties had made complaints, Harlan, on November 22d answered, saying, "The claims that you referred to against the Rialto Grain and Securities Company, have been investigated by the Post Office Inspector connected with this Department, and he found the actions of our Company to be all right, and we are informed made a report in our favor relative to the same." (Rec. 115.)

Action on other Complaints.

The report of the Post Office Department shows that in addition to the letters of Mrs. Houts and Mrs. Evans, there were received letters as follows, up to March 26th, 1903: F. R. Fravel, November 8th, 1902; Arthur M. Allen, January 5th, 1903; S. A. Warner, January 21st, 1903; E. Onlette, January 28th, 1903; Jesse A. Foye, March 10th, 1903; and F. P. Andrews, March 20th, 1903. The next letter was Joseph Steiner, May 7th, 1903; and then follow nineteen letters or complaints at various intervals, to and including April 29th, 1904. The Court below excluded consideration by the jury of everything after March 26th, 1903, when the defendant terminated his relation with the Rialto Grain and Securities Company. (Rec. 97-98.)

The contents of these letters or complaints are shown only as to those by Houts, Evans, Warner, Fravel and Allen.

Burton's Knowledge of Complaints.

There was no evidence that Burton knew of the existence of these letters, except those of Houts and Evans. His only knowledge of these two letters was that Cochran told him of their existence, but not their contents. Furthermore, the positive evidence on behalf of Burton is that he did not during his employment know of any other letters than those of Houts and Evans.

The evidence shows affirmatively and conclusively that the only officials of the Governmen who knew anything of these letters until after March 26th, 1903, were (1) Blaine W. Taylor, Chief Clerk of the Post Office Department, who opened all mail and sent each piece to the Division or Section to which it belonged; (2) George M. Smith, Clerk in the office of the Chief Inspector, who sent out complaints to the Inspection Divisions respectively to which they pertained; (3) Frank E. Davis, the Chief Clerk of the Inspector in charge of the St. Louis Division, who received and opened the mail for his chief; (4) George A. Dice, the Inspector in charge at St. Louis, who turned the letters over to M. G. Price, the field inspector, for investigation; and (5) M. G. Price, who made the investigation and reported the complaints unwarranted.

What Burton Did.

All of these officials dealt with these letters in the regular course of their duty, without a word or intimation from anybody in the Department or out of it. Senator Burton never spoke, wrote or hinted anything to any of them. It does not appear that he ever saw one of them or knew that any such person was in being.

The only person he ever spoke to was William E. Cochran, the Chief Inspector, of whom he inquired, as Cochran testifies, on November 20th, whether there were any charges against the Rialto Company, and received the information

that there were two complaints, and the names of the complainants. And Cochran was unable to answer the inquiry without in turn inquiring of his clerk, and then could answer only as to the fact of the complaint and the names of the complainants. He knew nothing beyond the endorsement on the so-called "jacket" of the complaint, and the defendant did not know anything of it and did not assume to, and the merits of the matter were not considered by them or either of them. (Rec. 167 and 8.) At this time the Houts and Evans and Fravel letters had already been sent out to St. Louis, had been examined into and found unwarranted.

Cochran did not interfere in any manner with the orderly course of affairs, and was not asked to do so. His division was charged only with the duty of investigation, and had no authority to issue a fraud order. There is no evidence that the defendant ever talked to any other official or had any one do so, in connection with this matter.

Over the objection of defendant, Cochran testified that "I should have given to any one inquiring, probably, the fact that a case had been made up, but I should not have given to him the names of the complainants." "Why did you give them to him?" "Because he was a Senator of the United States." (Rec. 159-160.)

This was the only thing suggested as having been in fact accomplished by the defendant, and this the Rialto Company already knew, and they knew further what apparently Cochran did not know—that the complaints had been investigated and rejected by the field inspector.

The Government offered evidence to show that on Monday, December 1st, 1902, the defendant called on the Assistant Attorney General of the Post Office Department, but there was nothing to show the object of the call or that it related in any wise to the Rialto Company, and at that time the matter was not before that officer. (Rec. 181-184.)

Who Prevented Issuance of Fraud Order.

Complaints came in after March 26th, 1903, and more frequently than before, and in July a thorough investigation was undertaken by Field Inspectors Price and Piatt, beginning with January 1st, 1903, and not again considering the Houts, Evans and Fravel complaints, and they made a written report on August 20th, 1903, substantially to the effect that something done on June 17th, 1903, for which Major Dennis was not responsible, he being at the time away, broken mentally and physically, was the basis for a criminal prosecution against the officers of the company, and concluding, "This report and the evidence are submitted without recommendation for whatever action the Department may see fit to take. As bucket shops that are conducted through the mails exist, it is believed that the Rialto Company has conducted a fairly honest business, with the exception of the deal of June 17th, and we are therefore disposed to accept District Attorney Dyer's advice to recommend no fraud order. For the value that the papers herewith forwarded may be in the case of prosecution, it is recommended that they be returned as soon as they have served their purpose with the Department." This report was forwarded in due course, and coming before Charles H. Robb, Assistant Attorney General for the Post Office Department, he reports that, "in accordance with the recommendation of the inspectors, will close the case without further action by the Department at this time." (Rec. 216-226.) As the record shows, the prosecution of the defendant in the Court below was conducted by District Attorney Dyer and Assistant Attorney General Robb, who both recommended after full investigation that no fraud order issue and no fraud order ever was issued. There was no pretense by any one that the defendant or any one else influenced these officials. The indictment charged the defendant in the first, second, sixth and eighth counts with having undertaken the

service, and in the third and seventh counts, with having rendered it, "of appearing before the said Post Office Department, and before the Said Postmaster General, the Chief Post Office Inspector, and the Assistant Attorney General for said Post Office Department as an agent and attorney for the said corporation, and obtaining information for said corporation concerning said proceeding in this count mentioned, in which the United States was then indirectly interested, and by the influence of his presence and of his office as such Senator, and by statements, representations and persuasions, *inducing the said Postmaster General to believe that the said corporation was not conducting any such scheme to defraud, etc.*" The facts stated in this paragraph of this brief showing that the case was not before the Postmaster General or the Assistant Attorney General for the Post Office Department until months after the defendant's connection with the Rialto Company had ceased, and was then decided, not upon any statements, representations or persuasion of the defendant, but entirely upon the recommendation of those who were prosecuting him, were not permitted to be shown to the jury. (Rec. 215 and 216.)

Burton's First Visit to Department November 20th, 1902.

The letter from Harlan to Burton of November 18th, 1902, after confirming the telegram respecting the employment of Burton, deals exclusively with the apprehended indictment of Dennis on account of Brooks Brokerage Company matters. There is not a word in it concerning the affairs of the Rialto Company. It asks the defendant to ascertain, if he can, the intention of the Government respecting this indictment, and it asks nothing more by remotest hint or intimation. (Rec. 112-113.)

Pursuant to this letter, Burton called on Cochran, and

on no one else. The only witnesses to the interview were Burton and Cochran, and the only evidence other than their testimony, respecting it, is Burton's letter of November 20th.

Cochran on direct examination (Rec. 159-160) testified that Burton asked if "any complaints had been received, or any investigation was under way with reference to the Rialto Grain and Securities Company, and I secured the information and gave it to him. * * * I told him that there was such a case, and gave him the names of the complainants on whose complaint the case was jacketed. * * There was a general discussion as to the business of the Company, the Senator telling me that the Rialto Company was endeavoring to do a straight business, and that any trouble they might be in was trouble about the old company, and that the new company was all right."

Being asked whether this was all that was said at the time about the matter he answered, "That was the substance of it, I think." (Rec. 160.)

On cross examination (Rec. 166-168) the additional matter was that the prospective indictment against Dennis may have been talked about then—it was either then or afterwards. At this time Cochran had no knowledge of the nature of the complaints by Houts and Evans, and there was no discussion of the subject matter of them. Burton did not assume to know anything of them, and neither did Cochran. Neither of them discussed any such thing as a fraud order, and never did. Burton never requested that no fraud order be issued. The witness testified also that Burton repeatedly said that he did not wish to antagonize the Department in any way and would not contend for his view of the case even if he was satisfied the Department was wrong. This, however, was not said specifically of the first interview.

On redirect examination (Rec. 175) Cochran said he had no right to issue fraud orders, and any request that might

be made to withhold fraud orders would not ordinarily be made of him. His division simply made investigation and reported the facts to the Assistant Attorney General, and if a fraud order was issued at all, it was first considered by the Assistant Attorney General and submitted by him to the Postmaster General for action, and if a request for a hearing was made, it should go to the Assistant Attorney General.

Burton testified on direct examination (Rec. 235-236) that he inquired as to the proposed indictment of Dennis, and was told that the matter, so far as the Department was concerned, was with Dice, the Inspector in charge at St. Louis. He then asked Cochran what he knew about the other Company, and Cochran answered that he knew nothing. Burton then inquired whether there were any complaints against it. Cochran examined the records and answered that there were two filed in the latter part of October or first of November, and that they had been sent out to St. Louis on November 7th. Burton said further, "Mr. Cochran, my understanding is that the trouble as to Major Dennis grew out of his connection with the Brooks Company; that has suspended; and I have been led to believe by the local attorney of the Company that this Company is all right, but I don't know. They are strange to me. And if there are any complaints filed here against the Company, or anything that puts you upon inquiry I wish you would let me know, unless there is some reason why you should not." Burton then asked about the custom, and Cochran said it was always the custom to grant a hearing to parties against whom complaints were filed, unless it was a very aggravated case. Burton said, "If anything comes to you that requires summary action, of course I don't ask to be advised." I said to him that whereas I was attorney of the Company, I was not its attorney there, and under no circumstances could I be employed as the attorney in the Department. I think that was about all of the conversation."

On cross-examination he testified:

"Q. When you went down to see Mr. Cochran on the 20th of November, 1902, you had in your mind, you say, the matter of Dennis' threatened indictment for his connection with the Brooks Brokerage Company; is that true? A. Yes, sir.

Q. How did it become important, if it did so become, for you to ask at that time if there were any complaints against the Rialto Grain and Securities Company? A. Well, I had been employed by the Company, and Mr. Dennis was a stranger to me, and so was Mr. Harlan. And Mr. Dennis was threatened with trouble because of his connection with the Brooks Company, and I wanted to know that the assurances that Harlan had given me were true.

Q. Then at that time you were informed that complaints had been made against the Rialto Grain and Securities Company, and these complaints had been by Mr. Cochran forwarded to George A. Dice, Post Office Inspector in charge in St. Louis for examination and report, were you not? A. I was informed as to these two complaints that they had been sent out here for examination.

Q. And then, being so informed, what gave rise to your saying in substance, in your letter to Harlan, 'All such complaints must be taken care of, especially until we get out of the Brooks matter?' A. Why, the reason—You ask me the reason for that expression in the letter?

Q. Yes. A. I do not have any independent recollection of dictating the letter, but I take it that the reason was, that the indictment of Dennis being made public, and Dennis owning the Rialto Grain and Securities Company—in fact, I never disassociated the two; when I thought of the Rialto Grain and Securities Company I thought of Dennis; and when I thought of Dennis I thought of the Rialto Grain and Securities Company—would naturally cause more or less excitement, and complaints might be sent in; and my advice to him was to take care of it." (Rec. 244-245.)

* * * * *

Q. When you went to the Post Office Department to see Mr. Cochran on the first occasion of your visit, to-wit, on the 20th day of November, 1902, did you say to Mr. Cochran that the Rialto Grain and Securities Company was all right? A. I don't know that I said it just in that way. I told him, I think this: my information is that the trouble between Dennis and the Government grew out of his relation with the Brooks Brokerage Company, and that I had been advised by the local counsel, who had employed me, that the other company was all right; and I also explained to him, however, that I was a stranger, and that I did not know them.

Q. Did you tell Mr. Cochran in that conversation at all that you had been employed by Harlan or by the local attorney? A. I told him first that if he intended to indict Dennis I expected to help defend him. And I told him that I was the attorney of the Company, but not the attorney here; but as I said a while ago, I never disassociated Dennis and the Company, so far as that, as Dennis owned the Company.

Q. I am not asking you what you disassociated. I am asking you whether at that time you said to Mr. Cochran, 'The Rialto Grain and Securities Company is all right?' A. I may have used that language, Colonel, in the connection in which I told you.

Q. Did you say to him at all that you had been employed by the local counsel? A. I didn't know that I said by local counsel. I think I said to him that I was assured by the local counsel, who employed me. I said to him these parties are strangers to me, and I don't know. (Rec. 247-248.)

* * * * *

Q. I will read you from your testimony given before: In speaking about your interview with Mr. Cochran, I ask you whether this question was asked you, and whether this answer was given by you: 'Q. Right there, Senator, what was your purpose in making that inquiry of Cochran in reference to any complaints concerning the Rialto Grain and Securities Company; state to the jury what your purpose in that re-

spect was?' 'A. I had been employed as counsel for the Company. That I had this letter from Mr. Harlan, referring to letter of November 18th), telling me that the tentative employment he had made with me had been ratified by the Company. I had been advised that Major Dennis had had trouble with the Brooks Brokerage Company. As I say, I went there to ask about that. Both Mr. Kastor and Mr. Harlan had assured me that whatever irregularities there were in that Company, it was not the fault of Major Dennis. I knew Judge Krum and Mr. Harlan were the attorneys of this Company, but, being advised that far, I went to satisfy myself with respect to the standing of this Company in the Department. That was the motive of the inquiry.' Was that question asked you and did you answer it in that way? A. That question was asked me, and I answered it in that way, I think.

Q. Was there anything said in your conversation with Mr. Cochran on that occasion, about a criminal prosecution against Dennis? A. Yes, sir." (Rec. 250.)

Cochran was called to the witness stand in rebuttal, but was not asked anything as to this interview.

Pursuant to this interview Burton on the same day wrote to Harlan (Rec. p. 114) as follows, viz:

"November 20, 1902.

Mr. Thomas B. Harlan, Rialto Grain and Securities Company, St. Louis, Mo.

Dear Sir: Your favor of November 18th received. I called at the Department this morning and find that there are two complaints lodged against your Company. One by Bella Evans and the other by Mrs. K. C. Houts, both of Albany, New York. These complaints were sent out from the main office here for investigation on the 7th of November, and doubtless the Inspector there has called your attention to them before now. If he has not, he will do so very soon.

I should like to be advised what there is in these complaints. Without knowing anything about the merits of the same, I would advise that all complaints

receive special attention by your Company, and if possible satisfy the complaints, especially should this be your motto until after this Brooks matter is entirely out of the way.

I have arranged with the Department to be advised in case any complaints are made against your Company, and have arranged for a hearing if any hearing should become necessary. I have assured the Department that it is the purpose of your Company to comply strictly with the law, and that it is your desire to remain at all times in perfect harmony with the Department.

No action of any kind will be taken against you without my first being notified, and every opportunity for full explanation or hearing will be had.

In return, if agreeable, you may make remittance for my first month's pay.

Faithfully yours,

J. R. BURTON."

This was all the evidence as to the first interview and the first letter. There is no evidence and no suggestion that when Burton wrote this letter he had seen any official save Cochran or that he had said anything or done anything save what he said or did in the interview of that day with Cochran.

Burton's letter was answered by Harlan on November 22d, and so far as relates to this matter states, "The claims that you referred to against the Rialto Grain and Securities Company have been investigated by the Post Office Inspector connected with this Department, and he found the actions of our Company to be all right, and we are informed, made a report in favor of our Company relative to the same." (Rec. 115.)

And this is the end and all there is of Houts and Evans in this case so far as concerns Senator Burton.

Conference of Harlan and Burton in Washington.

On the 26th of November, Harlan was in Washington and conferred with Burton concerning the prospective indictment of Dennis. They did not go about the Department and the Houts and Evans complaints were not mentioned.

Harlan returned to St. Louis on Saturday night, the 29th of November, and found that Dennis had been indicted, and arrested, and had given bond, and wired Burton that night accordingly.

The Indictment of Dennis.

On the 2nd of December he wrote at length to Burton on the subject, and as to its effect on the Company and business. The fact of the indictment has been telegraphed abroad and the day's mail has brought in several letters, threatening in their nature. He states what they will do with complaints. "We will be able to meet each one of these cases individually, and show the Post Office Department a clean record. * * * Locally, I believe we will be able to control the situation, as this business has been pretty thoroughly gone over by the Inspectors and they understand just what we are doing, and how we are doing it. At your end of the line, you will of course, use your own judgment in handling the situation. We will at all times be glad to observe any request made by the Post Office Department or to submit to any examination that they may direct.

The cases here are set for trial on the 6th of January, and Judge Krum and I are preparing now for trial. We will get all the evidence in shape; I will thoroughly brief the law pertaining to the cases, and when we have got matters worked out, we will submit the whole case to you for your

consideration, and would certainly much appreciate it if you could find it convenient to be here to participate in the defense." (Rec. 116-117.)

Supposed Interview with General Tyner.

To show that Burton did something at "his end of the line" the Government introduced Paul B. Kaiser, who testified that on Monday, December 1st, 1902, at from five to ten minutes before nine o'clock in the morning, Burton came to the office of the Assistant Attorney General for the Post Office Department and asked, first for the head of the Department, and then for a man who occupied a desk to which he pointed. While this was going on, the desk occupant, Mr. Hubner, came in. (Rec. 181.)

Mr. Hubner testified presumptively with respect to the same incident, but not so explicitly in respect of date as did Kaiser, that Burton asked for General Tyner, who came in about half an hour, and that Burton was with General Tyner for about half an hour. What the interview was about, he did not know.

The defendant moved to strike out this testimony, but the motion was overruled. (Rec. 183-184.)

The defendant testified that he had no recollection of ever meeting General Tyner in his office, and he did not call on him in consequence of any communication from Harlan. (Rec. 248.)

The telegram from Harlan was sent late on the 29th of November, and simply gave information as to the indictment. The letter was written on December 2d, and would not reach Washington until the 4th.

There was no reply of any kind by Burton to either telegram or letter, and no report at any time of any visit to anybody in connection with either letter or telegram.

Every visit shown to have been made by Burton to the Department was a visit to Cochran, the Chief Inspector,

and every visit save the third, when he was accompanied by Dennis, is evidenced by letter or telegram to somebody.

The evidence of Kaiser and Hubner was submitted to show visits to and efforts to influence the Assistant Attorney General for the Post Office Department. It is to be remarked that the Rialto Company matter was not before this official at this time and did not come before him until Burton had long ceased connection with the Company, nor until there had been a change in the incumbency of the office itself.

Second Visit of Burton to the Department, December 9th, 1902.

On December 3d, Harlan wrote to Burton, advising him that two men, Bowman and Shove, were representing themselves to be Post Office Inspectors, and were undertaking to secure some advantages with the Company in settlement of accounts, by threatened use of their official positions. Harlan is of opinion these men are not Inspectors, but if they are it would seem that there was an effort to catch the Company in a trap. "This they cannot do by any honest methods, nor is the matter one of much consequence, except we would like to know if we are being investigated in this manner. I call attention to it merely as a matter for your information. I have just returned from a consultation with Judge Krum. He had a copy of the indictment and we considered the same and both feel that the case gainst Dennis and Garland will be taken from the jury. Up to the present time, I have found no authority to sustain the Government's position, nor do I see how they can make a case against either Dennis or Garland. Today's mails have brought in a number of letters enclosing newspaper clippings, but most of the letters are very fair, and if the situation gets no worse than it now appears, the Rialto Company will have but little trouble in getting through with the situation. Will keep you fully informed. Yours very truly, —— —— P. S.—

Bowman represented that he was connected with Philadelphia office." (Rec. 118.)

On December 9th Burton called on Cochran and inquired if Bowman and Shove were Inspectors.

Cochran testified (Rec. 160) that Burton called and made the inquiry as to these men and received the information that they were not Inspectors. He cannot recall definitely whether at this time he said the Rialto Company was intending to do an honest business and keep out of trouble. This statement was made at different times.

Burton testified (Rec. 236) that he simply inquired as to Bowman and Shove, was informed there were no such inspectors, that they had violated the law in representing themselves to be inspectors, and that there was nothing in it, and that no instructions had gone out from the Inspector's office at all, or something of that kind. The Inspector said he would like to catch these fellows.

On this same day (Rec. 119) Burton wrote to Harlan:

"December 9th, 1902.

Mr. Thomas B. Harlan, St. Louis, Mo.

My Dear Harlan: There is no man by the name of J. H. Bowman who is a Post Office Inspector. This man Bowman in impersonating a Post Office Inspector, violated the Statutes, and laid himself liable to punishment. The man operating in Colorado Springs was also a fraud. There has gone from this office no instructions whatever about the Rialto Company, and there is nothing in this office against you at this time. The matter in St. Louis, as you know, is in the hands of Mr. Dice there. I herewith return the letter.

I would suggest that you prepare carefully the case of Dennis for early next month, and I have learned to know that you must watch carefully that the jury is not set up on you. By the way: can you get a fair trial before Adams. These are all important questions that you must carefully consider. I will take care of things at this end of the line. Please keep me constantly advised. Faithfully yours,

J. R. Burton."

This is all of the evidence as to the second interview. It shows everything that was said or done by Burton. Not one word was said about the issuance of a fraud order; what complaints had been made had been sent out to St. Louis and were in the charge of inspectors there. Nobody had complained of being injured in any way save Mrs. Houts and Mrs. Evans, and their complaints had been investigated and reported upon as unfounded. Nothing was being done at Washington, and nothing was being done at St. Louis, and there is not a scintilla of evidence that this was due to any interference by Burton in Washington, or indeed by anybody anywhere.

Third Visit to Department, December 15th, 1904.

The third visit of Burton to the Department was on December 15th, 1902.

It is proper to observe in this connection that the Houts and Evans letters were sent out to St. Louis on November 7th. The letter of Fravel was sent out on November 8th. No other letter of complaint or charge against the Rialto Company or of information concerning it came in thereafter until January 5th, 1903, when Allen sent in a letter of information.

Inspector Price had investigated on November 14th, and reported to his superior, Dice, that there was no warrant for the complaints. There was no motive for nor incitement to further action by any official of the Government until some further charge was made, and what had been done before this time, was done before Burton was employed.

On December 15th Dennis had been indicted and was in Washington to confer with Burton respecting it, and this indictment was not merely the chief, but it was the only action of the Government pending of which Dennis or Burton had any knowledge and in which they had any concern.

Under these circumstances Burton called with Dennis at the Department.

Respecting this interview Cochran testified:

"Q. When, if at all, did you see him after—if you saw him again after the time he made the inquiry of you about the Post Office Inspectors. When, after that, if at all, did you see him? A. I think it was when he brought Major Dennis to my office and introduced him to me.

Q. Do you recall now about the time when that was? A. Why, it was after the indictment of the officers of the Brooks Brokerage and Commission Company, and, to the best of my recollection, was early in December, 1902.

Q. State what took place at that time when he came there with Dennis. A. The Senator said he wanted me to meet Major Dennis, and to see what kind of a man he was, and he also repeated the assurance that the Rialto Grain and Securities Company was endeavoring to do a straight business, and that all of the trouble with the Company was chargeable to Brooks.

Q. Did anything further take place there at that particular time that you can now recollect? A. I can't state certainly whether or not he said at this time that he would never antagonize the Department, but would try to establish a harmonious relation between the Department and the person he was interested in. He did make that statement on several occasions. I can't say, as a matter of fact, whether he said this on this occasion or not." (Rec. 160-161.)

On cross examination he testified:

"Q. Now, Mr. Cochran, the third visit, as I understand, was on December the fifteenth; and again I don't ask you to affirm that date? A. Yes, sir.

Q. But I think these are fixed correctly? A. Yes, sir.

Q. And that was the time when he called with Major Dennis? A. That was the time.

Q. He called at your office and he introduced him, and you knew at that time that there was an indictment pending against Major Dennis? A. I did.

Q. And Mr. Burton came there and introduced his client? A. He did, yes, sir.

Q. You understood that he would be counsel for Major Dennis, is not that it? A. No, I didn't, at that time, Mr. Lehmann, he did not distinctly state so at that time.

Q. Well, he introduced him, and said he wanted you to see the manner of man he was? A. Yes, sir.

Q. And you knew that the case was pending? A. Yes, sir.

Q. And there was allusion to that, was there not? A. To the case?

Q. Yes. A. I think there was.

Q. So that, the case against Dennis was talked about? A. Yes, sir.

Q. Now, at that time, he said nothing whatever about the issuance of a fraud order, did he? A. I think not." (Rec. 169.)

Burton testified as to this:

"Q. Coming again to the visit of Major Dennis. I believe you said he came down there to Washington? A. Yes, sir.

Q. State what occurred? A. I spent an evening with him in examining the indictment and the statement of facts, and that was all that evening, as I remember. The next morning I gave him my opinion about them.

Q. What further transpired? A. When I was ready to leave the hotel—he was stopping at the Willard—he called a carriage and we got in, and drove out the Avenue to my office in the Maltby Building; should say a distance of three-quarters of a mile. And as he was going away, he said he wanted to make a draft, that he wanted some money; and as he wanted more than I had I said, 'I will have to go to the bank with you.' So we got back into the carriage and retraced our steps going up the Avenue, and as we approached the Post Office Building, he made some inquiry as to what building it was, and I told him it was the Post Office Building. And I don't know, but my recollection is that I suggested that we get out and call upon the Fourth Assistant Attorney General, Mr.

Bristow. He was from my state. I think something was said that he had not seen the building, or something of that sort. We got out, and went into the building, went in the elevator to the fifth floor, and went into the office; but Mr. Bristow was not in. We waited a moment or two, and then we came out. And passing the stairway—there is an unique iron stairway right in the corner—he made some remark about it and we were looking at it. I said, 'Major, we can step down this stairway and take the elevator on the next floor.' We walked down to the next floor, and passed Mr. Cochran's room. He was sitting at his desk facing the door. I said, 'Let us step in, Major, and I will introduce you to Mr. Cochran.' We stepped in, and I introduced them. I said, I think, 'Mr. Cochran, here is the man you indicted in St. Louis, and I want you to see what a pleasant looking man it is you have indicted.' They then began to talk about family names, or something, and Mr. Dennis said his middle name was Cochran, Hugh Cochran Dennis. They talked a moment about where they were from and so on, and then we got up and left." (Rec. 237-238.)

On cross examination he was not questioned directly as to the matter, but rather as to his testimony concerning it on the former trial, as follows, viz.:

Q. Was there anything said in your conversation with Mr. Cochran on that occasion, about a criminal prosecution against Dennis? A. Yes, sir.

Q. In your testimony before, was this question asked you? 'Question: Did you go to his office? Answer: I went to his office. He was not in. We waited a few minutes, and then we left his office and went down the winding stairway there. I suggested that we go down that way and make a call at Mr. Cochran's office. Question: What occurred at Mr. Cochran's office? Answer: I think it is about as he told it.' Did you give that answer then? A. I probably did give it just that way. At least, that is substantially true. The only difference is, that my recollection is that it was not mentioned calling on Mr.

Cochran until we were passing the door, but I might have suggested it before we went down the stairway.

Q. That is only one flight down? A. Yes, sir, only one flight.

Q. Was this question asked you, 'Question: Your recollection as to what occurred is substantially what Mr. Cochran indicated? Answer: Well, sir, I don't remember anything different, unless it was, unless I said to him something about being Major Dennis' attorney.' Did you so testify? A. I think I did. Yes, sir. At least, I take the record for it. I don't remember the words.

Q. My attention is called to the fact that there is one question I omitted. This is the question I omitted: Was this question asked you and did you answer it as here? 'Question: You introduced Major Dennis to him? Answer: Yes, I introduced Dennis and I heard some talk there about Dennis' middle name being Cochran, and they talked about family matters.' Did you answer that? A. Yes, sir, I think I did. At least, I think that is true.

Q. Did you in the testimony you gave at that time, as you now recollect it, mention in that testimony a criminal prosecution against Major Dennis? A. I don't know that I used the word 'criminal,' but I had this letter here and I inquired whether it was his purpose to prosecute Dennis. I don't remember the words.

Q. I know what you have said here. I want to know whether or not, when you testified before, you testified then to what you have now said, as having reference to the prosecution of Dennis? A. I think I did, Colonel; I think I said something about it. I don't remember just the words. You can consult the record. I think I said I asked him, and I think he said he didn't know." (Rec. 250-251.)

The re-direct examination was:

"Q. Mr. Burton, I call your attention to your former testimony respecting that interview with Mr. Cochran, when Mr. Dennis was there; you were asked, very generally, 'your recollection of what occurred is

substantially as Mr. Cochran indicated?' Your answer was, 'Well, I don't remember anything different, unless it was, unless I said to him something about being Major Dennis' attorney.' You so testified? A. Yes, sir, I think I did.

MR. LEHMANN: I simply wished to bring in the context of what they inquired about.

Q. Was this question asked you: 'Question: Unless it is materially different, it is not necessary? Answer: As he gave it, it is substantially correct. Question: On that occasion, Senator, did you ever have any other purpose in going to Mr. Cochran's office than merely to present Major Dennis? Answer: No, sir, we were driving back from my office to the bank.' Did you so testify? A. Yes, sir, I did.

MR. LEHMANN: This is all I observe on this subject, although there may be more." (Rec. 251-252.)

The Fourth Visit on January 24th, 1903.

On January 24th the only change in the situation as to the Rialto Company in the Department was that Allen and Mrs. Warner had sent in their letters and these had been forwarded to St. Louis, Allen's on January 5th and Mrs. Warner's on January 21st. These were letters of information, enclosing literature sent out by the Rialto Company. Mrs. Warner's letter was in censure of all speculative dealing in grain as being mere gambling. The letters were forwarded by clerks as a matter of routine. Nothing was done concerning them in St. Louis, and this because the inspectors saw in them nothing calling for action. There is not a particle of evidence that anything was done by anybody anywhere to prevent investigation. Dice, the inspector in charge, continued in office without reproach until his death. Price, the field inspector, was in office at the time of this trial. Burton did not know of the existence of these letters. Cochran did not know they were in existence. So far as

any knowledge or belief of Burton or Cochran goes, there were no complaints against the Rialto Company, the Department had no concern of any kind with that Company, *with one important exception as to Cochran,* which we shall note presently.

The indictment against Dennis had been tried, and he had been acquitted by direction of the court. Books and records of the Brooks Brokerage Company, which Dennis had turned over to the inspectors to facilitate their investigations which led up to the indictment of Dennis and others, when the trial was over, had been turned over to State authorities. This was complained of as a breach of faith. Dennis wanted the books returned, and Burton called to see about it.

The exception as to Cochran noted above is *that either at this time, or in his recollection of matters thereafter, he had confused the Rialto Company with the Brooks Company, and supposed these books and records to belong to the Rialto Company, and so concluded that Burton was representing the Rialto Company, and was acting in the Department as the attorney of that Company.* (Rec. 170.) He did not become aware of his error until after the first trial, and his testimony is clouded and colored by it throughout.

Cochran testified (Rec. 161 and 162):

> "It was on the twenty-fourth of January, 1903. It was on the—I find that I was mistaken on that—it was on the twenty-third of January, 1903. This was after the case against the officers of the Brooks Brokerage and Commission Company had been dismissed in the United States Court, and the Senator stated to me that, during the progress of this investigation, a book, which I understand now was a record of that Company, but which I supposed at the time was of the Rialto Grain and Securities Company, had been turned over to the inspectors, and that Mr. Dice had, after this trial was concluded, and there was no case pending in the United States Court, turned it over to the Circuit Court, or the Circuit Attorney of this City for prosecution in the State courts. The Senator said that that was a breach

of faith, and insisted that I should direct Mr. Dice to recover the book and to return it back to the persons from whom he secured it.

Q. Well? A. I didn't see my way clear to take that action, and suggested to him, that if he wished I would submit the matter to my immediate superior the Fourth Assistant Postmaster General. This was done, and the same statement was made there, but he also declined to issue the order which was desired.

Q. When the statement was made, and submitted, were you with him at the Fourth Assistant Postmaster General's office? A. I was.

Q. Now, state to the Court, what occurred before the Fourth Assistant Postmaster General, as near as you can, when you went with this defendant there? A. There were practically the same statements made before him that were made to me.

Q. Then what did the Fourth Assistant Postmaster General do with reference to it? A. He also declined to issue the order, and my recollection is, that all three went to the Postmaster General, but the Fourth Assistant and myself, I know, went there, and the matter was stated to him, and by his direction a telegram was sent to Mr. Dice by me.

Q. On what day was that telegram sent by you, by direction of the Postmaster General? A. My record shows it was on the twenty-third of January, 1904.

Counsel for defendant: Do you mean 1903? A. 1903, that is right.

Q. Do you recollect what time of the day this visit was made to you, and to the Fourth Assistant Postmaster General, and to the Postmaster General? A. I should say it was in the forenoon.

Q. Have you stated all that occurred there at that time, upon that visit, as near as you now recollect it? A. Everything except the telegram that I sent.

Q. Yes. A. (Continuing) As I recall it.

Q. Now, after his submitting the case to you, and then to the Fourth Assistant Postmaster General, and finally submitting it to the Postmaster General himself,

what action was taken with reference to that matter; and state whether you, in accordance with the directions of the Postmaster General sent any message to Mr. Dice? A. There is a statement that I will ask permission to make. I find I made a mistake. I mistook one of these telegrams for another, and gave the wrong date for the message that was sent by direction of the Postmaster General. It was on the twenty-fourth, instead of on the twenty-third. I sent another telegram to Mr. Dice on the twenty-third, that I find here, and I mistook it to be that one.

Q. Well, you may read the dispatch you were directed to send Mr. Dice, after this visit of Mr. Burton to these offices. A. 'January twenty-fourth, 1903, Dice Post Office Inspector in charge St. Louis, Mo. Representations are made to Department concerning Dennis case that to surrender certain papers voluntarily placed in your hands for a spe (fici-) purpose would be a breach of faith. Please advise me. Cochran, Chief Inspector.'

Q. What representations do you have reference to in your dispatch to Dice? A. The representations made by Senator Burton."

On cross examination he testified (Rec. 169-172):

"Q. Now, the fourth visit was on January the twenty-fourth? A. The twenty-fourth.

Q. That date you fixed yourself? A. Yes, sir.

Q. And that was entirely with respect to the books of the Brooks Brokerage Company? A. Yes, sir.

Q. And, I believe you stated in your direct examination, that, at that time you had not understood, or did not understand, that they were the Brooks Company's books, but were acting with the view that they were the books of the Rialto Grain and Securities Company? A. I supposed that they were, at that time.

Q. Now, when did you ascertain that they were in fact not the Rialto Company's books but those of the Brooks Brokerage Company? A. It was not until the other trial of this case.

Q. So that, up until that time, you had been under the impression that when Mr. Burton called at your

office on this occasion of January 24th, he was calling in behalf of the Rialto Grain and Securities Company? A. Yes, sir.

Q. Now, all his conversation at that time was with reference to the Brooks Company's books, was it not—that was his business? A. That was his business.

Q. And whatever other conversation was had clustered around that in some way? A. Yes, sir.

Q. And grew out of the discussion of the Brooks Company's books? A. Yes, sir.

Q. He stated to you that those books—whether there was one or more—I have not yet determined—had been voluntarily given by Dennis to the authorities of the United States? A. He said they had been voluntarily given. I don't remember that he stated by whom or not, but that statement was made.

Q. I think you will recall, will you not, Mr. Cochran, that it had been in connection with the Dennis indictment that they had been given? A. Oh, yes, it was.

Q. And having been voluntarily given, why, it meant that Dennis who was the defendant in that case had voluntarily given the books to the Government? A. Yes, sir.

Q. And the statements and representations he made to you at that time were that those books, having been voluntarily given by Dennis to the authorities of the United States, and having been used to the full extent for the purposes of the United States, good faith required that they should be returned to Mr. Dennis before any other use was made of them by other parties. That was the substance of it? A. That was the substance of it.

Q. Those are the statements and representations that you referred to in your examination in chief, which you say were substantially repeated when you and Mr. Burton went to see Mr. Bristow at the Fourth Assistant Postmaster General? A. Yes, sir.

Q. You had declined to interfere, and Mr. Bristow declined, and thereupon you all went to the Postmaster General? A. Yes, sir.

Q. And the statements and representations which I have rehearsed here were in substance repeated by Mr. Burton to the Postmaster General? A. They were repeated. I stated, you know, that I wasn't as positive about his presence there as I was about that of Mr. Burton and myself.

Q. Well, we will treat that as immaterial matter? A. Yes.

Q. That is to say, you neither include or exclude him in the matter as I understand? A. Yes, sir.

Q. He may have been there and he may have not? A. My impression was that he was there.

Q. Yes, well that is why I included it? A. Yes, sir.

Q. But feeling that that is immaterial now; these statements and representations were substantially repeated if not by him, then, either by you or Mr. Burton, to the Postmaster General? A. Yes, sir.

Q. And the Postmaster General directed a telegram of inquiry, which you have referred to, to be sent? A. Yes, sir.

Q. In that interview, from its beginning in your office, its continuation in the office of Mr. Bristow, and its ending in the office of the Postmaster General, there was nothing whatever said about a fraud order, was there? A. No, sir."

Burton testified on direct examination (Rec. 238):

"Q. When did you next see Mr. Cochran? A. I can only fix the date by the letters as he does, and that was on the twenty-fourth of January, I think.

Q. What was the occasion of your calling there? What was the subject matter? A. I had received either a letter or a telegram—I have forgotten now which; and I don't know whether they are in or not. At any rate, I had received word from Mr. Harlan that the books of the Brooks Brokerage Company that Major Dennis had turned over—voluntarily turned over—to the Government or to Mr. Dice, to be used in the trial against him, were about to be turned over by him to the State authorities. I went down there and

talked with Mr. Cochran about it and I told him I did not know anything about it except the word I got. That if the Government wanted to keep the books I had no objection, and certainly would not make any. But if they were through with the books they ought in good faith turn them back to Major Dennis and not turn them over to the State authorities. He seemed to be in doubt about what to do about it, and my recollection is we went up to Mr. Bristow's room and Mr. Bristow seemed to be in doubt, and they two left and went to the Postmaster General. I don't think I went with them. At any rate, both of them said to me that the matter would be inquired about.

Q. That was the only thing, that was the sole and entire subject matter of your visit there? A. Yes, sir."

There was no cross examination.

The Fifth and last Interview with Cochran, February 5th, 1903.

On February 5th, 1903, the situation as to the Rialto Company remained unchanged, save that a letter had been sent in, which in regular routine had on January 28th been sent out to St. Louis. Neither Cochran nor Burton knew of the existence of this letter. But the books of the Brooks Brokerage Company had not been turned back to Dennis.

The interview of February 5th was at Burton's office in the Senate Annex. Cochran was asked to come there by Burton's Secretary, Colonel Smith. Cochran testified: (Rec. 163-164):

"The Senator told me that he had received a message from a Mr. Harlan in St. Louis—possibly showed it to me—but, any way, he told me that he had, and that he objected to the books being left with the Circuit Attorney here. He said that Mr. Harlan stated that the United States Attorney said he had no further use for the books, and insisted that they should be returned. I told him that I told him what I told him in the other

case and overlooked that the people in St. Louis should take the matter up with the United States Attorney if they wanted to recover the book, and that the Post Office Inspectors here would be governed entirely by such instructions as he might give, but I promised at this time to send a telegram of inquiry to Mr. Dice, and I did send one the next morning.

Q. Well, have you got a copy of that? A. Yes, sir.

Q. The dispatch that you sent to Dice in pursuance of this visit, this conversation you had with him, on the fifth of February? A. I may have stated that was the fifth of March.

Q. Sir? A. I may possibly have stated that was the fifth of March in my other, time, but I didn't intend to.

Q. Well, it was the fifth of February? A. Yes, the fifth of February.

Q. All right. A. 'February 6th, 1903, Dice, Post Office Inspector in charge St. Louis, Mo. Harlan attorney for Dennis, wires Senator Burton that you have surrendered books to State authorities, and that they are held subject to your order; also states that the United States Attorney says he has no further use for them. Please report fully all facts with your recommendation. Cochran, Chief Inspector.'

Q. Was that dispatch sent to Mr. Dice as a result of the interview that you had with the defendant? A. It was.

Q. Was there anything else said in that interview between Senator Burton and yourself with reference to his appearing before the Department? A. There was.

The business in hand, however, had been concluded. What followed in conversation was by way of retrospect, and is reserved for a separate paragraph.

On cross examination he testified: (Rec. 171-172.)

"Q. Now then, the fifth visit, being the last one which he ever made to you until after the indictment

was returned, was also with respect to the books of the Brooks Brokerage Company? A. Yes, sir.

Q. And it was because the books had not yet been turned back and he was making a complaint of that? A. Yes, sir.

Q. That the books belonged to Mr. Dennis, and good faith required that they should be returned to him if the Government was through with them? A. Yes, sir.

Q. And he insisted that the Government was necessarily through with them because the case against Dennis had come to an end? A. Yes, and the statement was also made that the United States Attorney said that he had no use for them.

Q. Yes. A. Yes, sir.

Q. Now, all that there was now, in that interview, from beginning to end, there was no talk about the issuance of any fraud order? A. No, sir.

Q. But you were formerly of the opinion that all those two efforts there to get the books, had relation to the business of the Rialto Grain and Securities Company? A. Yes, sir.

Q. And therefore, you testified on the former trial, that he said he wanted to appear in other matters as he had in the Rialto Company matter; but you are now advised that that was a matter with Mr. Dennis in reference to the Brooks Company's books, are you not? A. I am afraid not, Mr. Lehmann.

Q. The two last visits? A. That was not my understanding exactly.

Q. Well how about—you understood at that time that the books were the Rialto Company's books? A. Yes, sir.

Q. And you are now advised otherwise? A. Yes, but the discussion was a discussion relating to the Rialto Company.

Q. On the fourth visit? A. Yes, sir.

Q. I understood you to say that the only thing talked about was the books? A. I know, but the Rialto Company was what was in my mind at that time.

Q. What was in your mind? A. Yes, sir.

Q. . Yes. But now you understand that that is an incorrect impression? A. Well, that is possibly a matter of opinion. I don't know whether it is or not.

Q. Now, and on the subject of business of the fifth interview, that was about the Brooks Brokerage Company's books again? A. Yes, sir.

Q. Now, Mr. Cochran, the only time that you ever gave Mr. Burton any information with respect to any complaints against the Rialto Grain and Securities Company was the one time on November the twentieth when you told him there were complaints of Bella Evans and Mrs. Hout, which had been sent out? A. I think so; of course, I told him about the inspectors that he inquired about, whether they were investigating that cause or not?

Q. Yes, but I mean about any claim? A. Yes, sir."

As to this interview Burton testified: (Rec. 238-239.)

"Q. When did you next see Mr. Cochran? A. I fix the date again in the same way. It was February 5th. I got a telegram from Mr. Harlan that Mr. Dice had turned over the books and papers to the state authorities; and I had asked my secretary (I think I got it during sessions of the Senate) and I think I asked my secretary to ask him to come in the evening, or the late afternoon, just before dinner. He came there and I showed him the telegram, and he expressed surprise at that part of the telegram which said, 'Colonel Dyer says I have no further use for the books.' I said, 'Mr. Cochran, you have all the information I have about this, and I think if the Government is through with these books they ought to turn them back to Major Dennis.' He said, 'I think so too.' That was all there was on that subject.

There was no cross examination as to this.

The matter of the Brooks books was apparently adjusted in a few days, for Harlan telegraphs to Burton, and Burton writes on February 11th, saying:

"My dear Mr. Harlan: I have your telegram telling

me that things were satisfactory between you and Dice. I hope you are not letting him mislead you in any way.

I will be in St. Louis the fore part of next month, so soon as Congress adjourns, and shall aim to remain several days.

Be sure and keep me advised if there is anything to do at this end of the line before going away. I have tried to keep the Department in a good humor with Major Dennis, and I think I have succeeded.

If agreeable, on receipt of this, I wish you would have my monthly pay sent in, so I can reach it by Monday next. Faithfully yours,

J. R. BURTON."

This is the end of the case so far as concerns any interview with any officer of the Government having the remotest connection with or relation to the Brooks Brokerage Company, or Dennis or the Rialto Company.

And the only thing that had been done affecting the Rialto Company in any way was to inquire on November 20th whether there were any complaints against the Company, and getting the information that Mrs. Houts and Mrs. Evans had made complaint of some kind, and this information the Company already had, with the further information, which Burton had not until later he received it from the Company, that the complaints had been investigated and found unwarranted. No official had done or omitted anything because of Burton, and no official charged with determining directly or indirectly whether a fraud order should issue had been spoken to by him. He had said to Cochran, who was the official chief of the Inspectors, but who had no authority to either issue or recommend a fraud order, and who had no knowledge of the case and was not himself doing anything whatever about it, either that the Company was doing a legitimate business, or that he was so informed. He did not pretend to Cochran that he knew anything of the Houts and Evans charges, and never said a word respecting them.

Dennis Breaks Down.

Early in February, 1903, Dennis collapsed physically and mentally, and Mahaney took charge of the Company's affairs.

The McGowan Incident.

Mahaney testified that McGowan had presented a claim against the Rialto Company, and was acting very arbitrarily about it, and represented himself as being in high standing with the Government. Mahaney inquired concerning him, and Burton answered that he was an Indian agent in whom the Indian Bureau had great confidence. When the matter was fully developed, the court held that it had no relevancy to the case.

The Special Inspectors.

On the 25th of February, 1903, Mahaney telegraphed to Burton (Rec. 155):

> "Report to me to-day from apparently reliable source that two special inspectors have been appointed to investigate us and report to Postmaster General. Please verify and advise at once."

This was answered on February 27th, 1903:

> "No complaint in the Department against you. Will write full particulars by to-night's mail."

There is no evidence of any visit to Cochran or anybody else in this connection, and the answer in any event involved nothing more than an inquiry. As a matter of fact no inspectors had been sent, nor had anything of the sort apparently been contemplated.

Interview with Mahaney March 26th, 1903.

On March 26th, 1903, Burton was in St. Louis, called at the Rialto Company's office and received his last pay, being for the month beginning March 15th.

There was some conversation, Mahaney doing most of the talking. His testimony is that he said to Burton that, so far as he knew, there was nothing pending in the Department, and, as Congress had adjourned and there was no occasion for Burton's services, and they wished to reduce expenses, Burton would see the justice of discontinuing this particular charge. Burton agreed to this immediately. Mahaney says he added that if at any further time the Company needed his services they might communicate with him at his home in Kansas. Burton, he says, agreed with him that there was nothing dangerous pending in the Department, but did not state how he knew. Mahaney had no knowledge of the purposes or the scope of Burton's employment. Mahaney was indicted by the Federal Grand Jury because of his conduct of the Rialto business, in October, 1903, and his indictment has never been brought on for trial.

Hector McRae testified with respect to this same interview. He had been jointly indicted with Mahaney, and had never been tried. According to McRae, Burton said that his connection with the Company had been satisfactory, but that there was now nothing for him to do; that before leaving Washington he had called at the Department and found that there were no complaints against the Company.

There was no evidence that Burton had called at the Department since February 5th, and the jacket shows that in March, 1903, complaints had been made by Hon. Jesse A. Frye, U. S. Attorney at Washington, and by F. P. Andrews, Coden, Alabama, the first of these having been sent to Inspector Dice March 10th, 1903, and the second on March 20th, 1903.

If there ever was any thing for Burton to do for the Rialto Company in the Department, there was more on March 26th, when his connection with the Company was terminated, than ever before.

Active investigation of the Company was begun on the 27th day of July, 1903, by Inspectors Price and Piatt.

Dennis, who knew why Burton had been employed, had returned. The investigation continued for a month, and was of a very serious character, but Burton was not called on for help, nor communciated with in any way.

Burton's testimony as to this interview is that he called for his pay and got it, and that he said he wished this to terminate his contract. Mahaney said he supposed that if Dennis was there he would want Burton to remain, and Burton replied, "Well, he is not here and that matter can come up later," or something of that kind.

The Alleged Destruction of Letters.

Mahaney says Burton asked in the interview whether he had any correspondence of his, and he found he had two letters. "We looked them over, and I think the Senator said 'these are of no particular consequence, but inasmuch as my name was unfortunately connected at one time with the National Securities Company, it is just as well not to have these things in existence; if they fell into unfriendly hands they might possibly be misconstrued, although there is nothing in them that appears irregular, and with your sanction they had better be destroyed.' I destroyed those two letters."

Mahaney says these letters were, one with respect to the McGowan matter following the telegram of February 11th, 1903, and the other, a letter referred to in the telegram of February 25th, 1903. They were both of them in substance the same as the telegrams they followed and confirmed. Burton, the witness says, did not ask for the telegrams, and did not ask for any other letters.

McRae says there was some talk by Senator Burton about a great deal of annoyance that had been caused by the use of a letter by the National Securities Company to which his name was appended and that he did not wish for this notoriety. This talk was casual, and did not make much impression on the witness at the time.

McRae testified to nothing concerning this on the first trial in March, 1904, and did not think of it then. He had not paid much attention to it, but, he says, "My memory has been freshened and I remember distinctly the reference to the National Securities Company."

The defendant denies the occurrence IN TOTO.

It is remarkable that if at that time the defendant was engaged in gathering in and destroying evidence against himself that he should have stopped with these two letters which were substantially identical with two telegrams addressed to the same individual. If Mahaney, who was then in control of the Company's affairs, was willing to give up two letters, he would be as willing to give up more, but no more were asked for, although known to exist and to be under the control of Mahaney.

The Brooks Testimony.

Charles H. Brooks, the man referred to as having operated the Brooks Brokerage Company before it was bought by Dennis, and who in the testimony in this case was charged with being the responsible party on account of the transactions for which Dennis was indicted, was called on this trial as a witness on behalf of the Government. He was indicted jointly with Dennis in December, 1902, and later was indicted for conducting a get-rich-quick scheme. On this last indictment he was tried and convicted, and at the time of the trial his case was pending on appeal.

He testified that in the early part of January, 1903, Burton and one Richard Kastor came to his office in St. Louis, and Kastor said the Senator was willing to represent the National Securities Company (the concern Brooks was then operating) before the Post Office Department, provided they could agree on terms. Brooks answered that his business was legitimate and there were no complaints against him that he knew of and he was anticipating no controversy.

Kastor said the Government was investigating all speculative houses in St. Louis, and it was but a matter of time until they investigated Brooks, and then Burton could be of use to him before the Department. Brooks said he could not see how the Senator could stop the investigation, and Kastor, pointing to the Senator said, "Here's the man who has defeated you in your fight against Dennis and stopped the issuance of a fraud order." Brooks responded "if he has that influence with the Department, I think I had better also employ him to protect this business." (Rec. 201.)

On cross examination he said he had no arrangement with the Government for favor or consideration of any kind, that he had told no one of this matter save his attorneys until ten days before, when he was sent for or subpoenaed by the Government. He did not direct his attorneys to inform the Government of this and did not consult them after he was subpoenaed, and the testimony was absolutely volunteered on his part.

Burton testified that no statements of the kind were made in his presence by Kastor or any one else. (Rec. 241.)

Apropos of this testimony, it may be observed that Kastor's alleged statements concerning what Burton had done, were not true to the knowledge of Brooks. The fight of Brooks was against the Brooks Company, and Burton did not come within range of events until investigation was had and indictments were about to be returned. At the time of this alleged conversation, indictments were pending against both Brooks and Dennis. Brooks had not attempted to secure any fraud order against the Rialto Company. The complaints in evidence themselves show that they did not originate with Brooks, that they were not incited by him, and that he had nothing to do with them. The fight that Brooks had made, the fight against Dennis in connection with the Brooks Company, had not failed, but on the contrary had resulted in indictments, and had indeed succeeded altogether

too well, for "the engineer was hoist by his own petard." The sum of Brooks' testimony is that he declined Kastor's suggestion of Burton's service because his business was legal and he did not need it, and then, upon representations that he knew to be false, was willing to consider the matter.

Addenda to Interview of February 5th, 1903.

After the business which Burton had with Cochran on February 5th, 1903, was concluded, there was some general conversation which the Government relies upon as in the nature of an admission after the fact.

Cochran testified concerning this:

> "After this matter had been settled, or arranged, the Senator said to me, 'Cochran, I want to continue to appear before the Department in this and other cases, because I can make some money in that way to apply on my old debts,' he said he had lost very heavily in the panic, and that he had paid about seventy thousand dollars of debts for which he was not liable, but that he would never plead the statute to bar. He said there wasn't anything wrong in this; that a number of Senators—Senator Edmunds among them—had materially increased their income in this way, and then it was entirely proper.
>
> Q. Was that all—about all that was said? A. He said that if he ever overstepped the bounds he wished that I would tell him so.
>
> Q. Was there anything said to him at that time, or did he say anything to you at that time about the right of a Senator to appear before the Department for compensation? A. No, sir, he—he did say, however, that in all of these matters he would never antagonize the Department, that his efforts would be directed to bringing about a harmonious adjustment of differences, and, even if he thought the Department was wrong in the action taken, that he would not oppose them." (Rec. 164.)

On cross examination he testified:

"Q. Now, you recall the former trial, were you not asked 'Q. At any of these interviews between Senator Burton and yourself prior to the indictment did he indicate to you that he would not undertake to appear in the Department against the United States,' and you answered 'He did,' that is correct, is it not, Mr. Cochran? A. Yes, sir, I believe so.

Q. You say you think so—I didn't quite get your answer? A. I said I thought so.

Q. Then you were asked, 'Q. Are you able to recall on which occasion that occurred,' and you answered 'Why, I cannot with any certainty. The Senator told me that several times,' that is correct? A. I believe that is right.

Q. 'Q. Disclaimed whenever the occasion arose, didn't he, any purpose or intention to appear there against the United States?' 'A. I think he did, yes, sir.' That is correct? A. Yes, sir, that is correct.

Q. 'Q. Do you recall his having indicated that so far from desiring to appear as against the United States, if an occasion arose when summary action was necessary that he did not even ask to be notified with reference to it?' and you answered, 'No, sir, I cannot recall that. He did say, however, that he would not antagonize the Department, no matter whether he thought they were right or wrong or not, that even if he thought the position taken by the Department were wrong, even then he would not oppose them.'" (Rec. p. 175.)

Burton testified:

"I think something was said of a personal nature, about my having lost my fortune in the panic and the long hard years that followed, and that I was trying to supplement my salary, which was very small compared with the demands made upon a Senator, by the practice of my profession. And that this case had been tendered me, and I was very glad to get it. And then I said, 'Now, again, Mr. Cochran, I am the attorney of a company'—I don't know that I distinguished or

named the company—'that has got to do with the mails.' I thought he would understand it. 'And I am anxious that there shall be nothing on my part that would be in the least bit questionable. I cannot afford to remain the attorney of the Company if it is in trouble with the Department at all.' I don't remember the words, but that was substantially it.

Q. What did you say, if anything, with respect to having practiced in the Departments, or other Senators having practiced in the Departments? A. I think that arose in this way: I had been in doubt—I knew the old custom in the Senate was that Senators who were lawyers continued their practice in the courts and as counsel. Men like Conkling and Edmunds and other lawyers. When I went to the Senate I didn't know but that some custom had grown up to change that. Of course, I knew they had a right to do it. I think I spoke of that, I had inquired and found there was nothing—no custom against it, and that it was all right. I know I mentioned Edmunds' and Conkling's names. But I did not say anything about them practicing before the Departments.

Q. What about yourself practicing before the Department? A. Oh, no, it wasn't there—it was practicing my profession.

Q. What was the case that had been referred to by you? A. The only case was the case against Major Dennis. I notice Mr. Cochran speaks about that case made on the two complaints. He might have done that without my comprehending what he meant. I never knew they called it a case. I supposed every complaint stood on its own foundation, and I never heard of a jacket, or complaint, until Colonel Dyer was making his opening statement in the last trial." (Rec. p. 289.)

This supplemental talk proves nothing in itself and adds nothing to the proof that had gone before. It was not action before the Department, and was not either the assertion or admission of anything done before that time as to which there was not as complete substantive evidence of the fact as the nature of the case permitted.

According to Cochran, the defendant characterized what he had done as practicing in the department in the Rialto Company's case, and yet at the same time said he would never appear in the Department against the United States and would not oppose the Department even though he thought it wrong. And this is applied by Cochran to a matter in which the only thing defendant had done, was to inquire whether any complaints existed, and as to which Cochran had no knowledge save that two complaints did exist, and even this knowledge he acquired in connection with the defendant's inquiry. And the matter was one to which Cochran had given no attention and to which he gave none thereafter, as to which he was not asked to do, or to refrain from doing anything. It is inconceivable that anybody should have talked of this as practicing in the Department.

Burton had also made inquiry whether two men representing themselves to be post office inspectors were in fact such, and was answered by Cochran that they were not. Certainly nobody considered this as the practice of law.

Then there was the introduction of Dennis' after he had been indicted and the ensuing conversation as to family names.

The only thing approximating practice or service in the Department was with respect to the Brooks Brokerage books. As to this there were statements and arguments made. The Department officials were requested to do something, and the matter was taken up to the Fourth Assistant and then to the Postmaster General. But this was not the Rialto Company's case, although Cochran thought it was. It was an incident of the Dennis case in which Senator Burton had been employed and in respect to this case he had the right to render service whenever and wherever occasion therefor might arise.

This Dennis case was the only case in which Burton had

done anything that could be characterized as the practice of his profession and must have been the case referred to as there was no other. Incidentally it had brought the defendant into contact with the Department and thus he had learned of the existence of complaints against the Rialto Company, whose counsel he was, and so would naturally and properly say that he "could not afford to remain the attorney of the Company if it is in trouble with the Department at all."

Interview with Cochran January 23d, 1904.

This was immediately after the indictment was found against Burton and on the day the fact was announced in Washington. Nothing in this interview adds anything to the substantive evidence in the case. There was not even anything that can fairly be called an admission. It was altogether a matter of characterizing what had been done by Burton in his relations with Cochran. And it is to be borne in mind that Cochran, at that time, was under the belief that everything Burton had done was done by him for the Rialto Company. He had not the Dennis case or the Brooks books in mind. At the best, Cochran's testimony is vague and indefinite. According to Cochran, Burton spoke of visits to the Department and getting information, but he did not understand that this was wrong. He asked what section the indictment was under, and what its purport was, and, being informed that it made it an offense for a member of Congress to practice before the Department, he said he had not been practicing before the Department. Before this he said he had appeared as attorney for the Company. He had been glad to get his employment, as it was a profitable one. Burton reminded Cochran that he had frequently assured him that he did not wish to antagonize the Department, and Cochran said this was so. It was quite a long conversation. (Rec. 165-166.)

Mr. Vickery's testimony was very much to the same effect, with an addition on cross examination suggesting that Burton said he had received a fee specifically for appearing before the Department. His testimony was:

> "Q. Now didn't he say at that time that he had been employed in this case as Attorney,; that he had met them at St. Louis on his way either to or from a session of Congress; that he had received a fee from them, a good fee—that he was not a cheap attorney and would not accept service unless they could pay; that it was intended or expected that he might be here at some trial, but afterwards that had been abandoned, they having determined it was not necessary, and he did not come? A. Yes, sir, he said that.
>
> Q. So that the fee that he referred to was in the case that was expected to be tried here? A. No, the fee wasn't referred to in that case. The fee was for his appearance, as he related to Mr. Cochran, his appearance before the Department as attorney, because he quoted that he mentioned to Mr. Cochran on his visit with Mr. Cochran that he wouldn't antagonize the Department. He mentioned that particularly as something incidental—it was his intention he should appear here in the case, but that was abandoned afterwards." (Rec. p. 179.)

Burton testified:

> "In the dispatches that were brought to me by an Associated Press man, Mr. Cochran's name was mentioned as having been in St. Louis and testifying before the Grand Jury, I think. I don't know about that; at any rate, he had been here about that time. I asked my secretary, Col. Smith, to ask him if he would not come to the office. He did come, and brought with him Mr. Vickery. I asked him if he could tell me what this case was about; he said that he had testified before the Grand Jury, and that he was not at liberty to tell what he had testified to. I told him I did not ask him to tell me what he had testified to before the Grand Jury, but to tell me, if he could, what was the nature of the charge against me. He said he thought—I

think he also remarked that he would probably be a witness, and hesitated to say anything. He said that it was founded, as he understood it, on Section 1782; and I asked him further about it, and he said it was a charge for practicing before the Department. I said 'Well, Mr. Cochran, I haven't practiced before the Department. What cause have I tried before the Department?' I think those were my questions, or something of that kind. And he didn't seem to want to talk, and I said, 'I haven't any hesitancy in giving my memory of it' I said, 'I told you I was the attorney of the company, but I was not its attorney there. That under no circumstances could I be employed to try a case in the Department.' I said, 'I have gone before the Department the same as I have gone to the Pension Department, and other departments, and if I cannot do that without being treated in this way, I will quit.' I said, 'I have tried always to be in harmony with the departments, and not be in opposition to them.' And when I got through talking, in a few moments, he said to me, 'Senator, I will make one statement notwithstanding I do not want to talk. You did say that you could not be employed under any circumstances as an attorney in the Department.'" (Rec. p. 240.)

W. W. Smith testified as to this:

"The Senator asked Mr. Cochran in regard to the indictment that they had just learned had been rendered against him in St. Louis. And Mr. Cochran went on and said, that he thought it would be improper for him to discuss it or talk about it. But the Senator said he wished to say to him, and to talk to him about it; he wished to tell him just that he wished Mr. Cochran would tell him how it came about, or why he was indicted, and under what statute he was indicted. And I think Mr. Cochran, as he stated to you, told him that it was under Section 1782 of the Revised Statutes, which provides against the appearance of Senators and Representatives before any of the departments of the Government for pay. And the Senator went on and told him his version of it. That he was not aware that he had ever infringed upon that statute,

or that he had appeared before any department for pay. And while he conceded that he was the attorney of this company, he emphasized the matter, as he had done before, that it was not for pay, and that he could not be employed by anybody to appear before any department for pay.

Q. When the Senator had finished, what did Mr. Cochran say? A. When the Senator got through Mr. Cochran said, 'Well, Senator, I will make one statement; and that is, that you did tell me that you did not appear before the Department for pay; nor neither could you be employed to appear before the Department for pay, for anybody, by anybody.'" (Rec. pp. 252 and 253.)

In rebuttal Mr. Vickery denied that Cochran had made the statement contained in the last paragraph of Mr. Smith's statement. Mr. Cochran did the same, but at the former trial, although in the court room and having heard Mr. Smith's testimony, he did not.

And we submit as to it all, that whatever the defendant did or did not do, he did not practice in the Department for the Rialto Company. Burton inquired, "What cause have I tried before the Department? What have I done before the Department?" What answer did or could Cochran make? The only answer possible was that Burton had made an inquiry of a [illegible] statement to an official who was not charged with either hearing or determining the matter involved and concerning which neither the official nor the Senator knew or professed to know anything.

The Newspaper Interviews.

The testimony of Mr. Lindsay on cross examination consisted of a verification of his testimony on the former trial, when, as he says, the matter was much fresher in his memory. This is the substance of it:

"The Senator said over the phone that he had received a dispatch from St. Louis saying that he had

been indicted there and he said he didn't know exactly what it was all about; that he was not guilty of any wrong doing; that he was going to St. Louis as soon as he could and insist upon a trial, and he said it was in reference to the Rialto Grain and Securities Company, I believe, and that the only connection he had with it was through Major Dennis, who was an old friend of his, who had been indicted, and he was Major Dennis' attorney; that he had gone to the Department to see Mr. Cochran, I believe he said with Major Dennis, on an occasion, and he had told Mr. Cochran he had come there to see what charges there were against his client, and he had insisted to Mr. Cochran that he came as an attorney and not as a Senator, in regard to the matter." (Rec. p. 187.)

Mr. Aubere said he interviewed the Senator and later on the same day, it is suggested that it was after he had seen Cochran, something was added by interlineation. The report of the interview with the added words italicized is as follows:

"I was retained as counsel for Major Dennis during his trouble in the winter of 1892 and 1893. I became associated with Mr. Harlan, his local attorney, and other St. Louis counsel in a regular way, and upon the recommendation of mutual friends. I talked over the case with local counsel in St. Louis, and later Dennis came on here to Washington, bringing a copy of the indictment which had been found against him in St. Louis. I conferred with him about his case, and afterward went to St. Louis and conferred with his local counsel. While Dennis was here I went with him to the Post Office Department and introduced him to Supt. Cochran, Chief of the Inspection Service of the Department. I told Mr. Cochran that Dennis had been indicted by the Federal Grand Jury in St. Louis, and that I had examined into the case, and as far as I could see, I did not believe that there was a case against him. I wanted to know if there had been any complaint entered against Dennis before the Department, and I was told that there had not. I then told Mr. Cochran that, although I was Dennis' counsel, I could not be retained

to oppose the Department in this or any other matter, and would not do so. I told Mr. Cochran, and I believe he will bear me out in the statement, that both Mr. Dennis and his local counsel, Mr. Harlan, had advised me that Dennis proposed no violation of the Federal law, nor would he oppose any order or wish of the Department. This was done in the presence of Mr. Dennis, my client. *I called at the Department once or twice to inquire if any complaint had been lodged there against Dennis, and on those occasions repeated my previous statement that I was not there to oppose the wish, order or rule of the Department in any shape, manner or form.* After consulting with local counsel in St. Louis, as already explained when I was out there during the holidays, we agreed that as Congress was soon to reassemble, it was not necessary for me to remain in St. Louis in the trial of the case before the Courts." (Rec. 191-192.)

Again we submit that there is nothing added to the testimony in the case. Here is nothing but a second hand report of the recollection of casual transactions a year after they occurred.

Why was Burton employed and what was he to do in the Course of his Employment.

This inquiry, it seems to us, naturally arises in the case, and while the burden in respect of it was not on the defendant, t was material and proper that he should answer it if he could. The contention of the Government, the necessary implication of its case, was that Burton was employed to exercise a sinister influence in the Department, that the office of the Senator, and not the function of the counsellor, was desired, and that everything else was a mere pretext.

But there was the apprehended indictment against Dennis, a serious apprehension as shown by the event. Concerning this there were repeated conferences at Washington and in St. Louis by Burton with Dennis, with Harlan and with Krum, and it was desired that Burton should participate in

the trial, but later, when the case had been fully prepared, it was concluded that it was not necessary that he should come from Washington for that purpose. The suggestion that the indictment was a trivial matter was not appreciated by Dennis, who collapsed under the strain of it. Furthermore, the question is one of good faith, and we offered to show that in addition to Harlan, Krum and Burton, he desired still more counsel and wished to engage additional lawyers in St. Louis, and even brought a barrister from Montreal to assist, but the Court would not admit this evidence.

The Rialto Company expected to engage in the business of selling securities upon a popular plan, fully detailed by Mr. Harlan in his testimony in respect of which it was believed Senator Burton could be very helpful. This feature of his employment is slightingly treated because in fact nothing was done by the company concerning it. Nothing could be done until Dennis, the president and manager of the Company, was acquitted of the indictment, and when this had come to pass, his health broke down and he was not capable of business again until July. During the interval Mahaney had engaged in illegitimate practices, and the Company was wrecked in consequence. Meanwhile, Burton had ceased his connection with it.

In addition to these specific matters in mind at the time of the employment, other occasions for the services of a lawyer might well arise.

The statement of the evidence has been carried to this length because of the desire to set out everything having any possible bearing on the issues involved.

MOTIONS TO DIRECT A VERDICT FOR DEFENDANT.

as to each count of the indictment were made at the close of the Government's testimony, and repeated at the close of all the testimony in the case. These motions were overruled. (Rec. 207 and 255.)

THE CHARGE TO THE JURY.

The court then charged the jury as shown by the Record pp. 256-262.

Exceptions were taken to portions of the charge and to the refusal of the court to give instructions requested by defendant. The questions arising upon these exceptions are also involved in the motions to direct a verdict. It is not deemed helpful to set out the charge as given and the instructions refused in this statement. The questions involved will be considered in the argument in connection with the points to which they are related.

THE ASSIGNMENT OF ERRORS.

will be found in the Record, pp. 270-281. The specific errors relied upon are set out in the Brief of Points and Authorities and the assignments of error involved are indicated under each head.

From the sentence and judgment the defendant has taken a

Writ of Error.

directly to this Court, under Section five of the Judiciary Act of 1891 (26 Stat. 826), which *inter alia*, provides for such writ of error, "in any case that involves the construction or application of the Constitution of the United States," and "in any case in which the constitutionality of any law of the United States * * is drawn in question."

This Court Has Jurisdiction,

because the case involves:

1. The construction and application of Art. III, Section 2, of the Constitution and the Sixth Article of Amendment, under which defendant is entitled to trial by a jury of the state and district in which the crime alleged against him was committed.

2. The construction and application of the Sixth Article of Amendment which entitles the defendant to be informed of the nature and cause of the accusation against him.

3. The construction and application of the provision of the Fifth Article of Amendment that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb * * * nor be deprived of life, liberty or property without due process of law."

4. The constitutionality of Section 1782 of the Revised Statutes of the United States, upon which the indictment was founded.

5. The constitutionality of Section 731 of the Revised Statutes of the United States as construed by the Circuit Court in the present case.

These questions are discussed under appropriate headings in the brief.

BRIEF OF POINTS AND AUTHORITIES.

I.

The United States was not a party to nor Interested in the Proceedings set forth in the Indictment.

(Assignment No. 1, Rec. p. 270.)

Inhabitants vs. Smith, 11 Metc. (Mass.), 390.
McGrath vs. The People, 100 Ill., 464.
Evans vs. Eaton, 7 Wheat., 356.
State vs. Sutton, 74 Vt., 12.
Foreman vs. Town of Marianna, 43 Ark., 324.
Taylor vs. Commissioners, 88 Ill., 526.
Railroad Company vs. Kellog, 54 Neb., 138.
Sauls vs. Freeman, 24 Fla., 209.
Bowman's Case 67 Mo., 146.
U. S. vs. Wiltberger, 5 Wheat., 76.
U. S. vs. Sheldon, 2 Wheat., 119.
U. S. vs. Morris, 14 Peters, 464.
U. S. vs. Clayton, 2 Dillon, 218.

II.

The Indictment states no facts showing the Pendency of of any Proceeding in the Postal Department.

(Assignment No. 1, Rec. p. 270.)

U. S. vs. Hess, 124 U. S., 483.
Post vs. U. S., 161 U. S., 583.
Virginia vs. Paul, 148 U. S., 107.
American School, etc. vs. McAnulty, 102 F. R., 565.
Dauphin vs. Key, 11 D. C., 203.
Enterprise Savings Assn. vs. Zumstein, 64 F. R., 837; affirmed 67 F. R., 1000.
Bates & Guild vs. Payne, 194 U. S., 106.

Public Clearing House vs. Coyne, 194 U. S., 497.
U. S. vs. Ju Toy, 198 U. S., 253.
U. S. vs. Eaton, 144 U. S., 677.
Caha vs. U. S., 152 U. S., 211.

III.

The plea of Former Acquittal as to the Offense Charged in the Third and Seventh Counts of the Indictment showed a former Indictment and Trial for and Acquittal of the Offense, and this plea was not avoided by the replication, and the Demurrer to the replication should have been Sustained. Placing the Defendant on trial again for the Offense Alleged was in Violation of the Sixth Article of Amendment to the Federal Constitution.

(Assignments 2 and 3, Rec. p. 270.)

Baldwin vs. Bank of Newbury, 1 Wall, 234.
Mechanics Bank vs. Bank of Columbia, 5 Wheat. 236.
Ford vs. Williams, 21 How, 289.
New Jersey Steam Navigation Co. vs. Merchants Bank, 6 How, 381.
Commercial Bank vs. French, 21 Pick, 486.
Dugan vs. United States, 3 Wheat, 172.

See also numerous other cases collected in 2 Daniel on Negotiable Instruments (1st Ed.) sections 1187-1189.

State vs. Cooper, 13 N. J. Law, 361.
Hurst vs. State, 86 Ala., 604.
Cooley Constitutional Limitations, 7th ed., p. 470.
People vs. McGowan, 17 Wend., 386.
Monroe vs. State, 111 Ala., 15.
U. S. vs. Lee, 4 Cranch C. C., 446.
Ball vs. U. S., 163 U. S., 662.

U. S. vs. Nickerson, 17 How., 204.
Mitchell vs. State, 42 Ohio State, 384.
Campbell vs. State, 9 Yerger, 333.
State vs. Martin, 30 Wis., 216.
Stuart vs. Comm., 28 Gratt., 950.
Gunther vs. People, 24 N. Y., 100.
Morris vs. State, 8 S. and M., 762.
State vs. Kattleman, 35 Mo., 105.
State vs. Kibble, 2 Tyler, 471.
Dealy vs. U. S., 152 U. S., 539.

IV.

A. There was no evidence to go to the jury that Burton made any agreement to receive compensation for services to prevent the issuance of a Fraud Order. Therefore the Court Erred in submitting to the Jury the question whether Burton made such agreement.

B. Whatever the agreement was which Burton made to receive compensation from the Rialto Grain and Securities Company for services, such agreement was not made in the State of Missouri, and the Defendant was deprived of his constitutional right to be tried in the State and District where the agreement was made, contrary to Section 2, Article 3, of the Constitution and of the Sixth Amendment thereof.

Tayloe vs. Merchants Ins. Co., 9 How, 390.
Patrick vs. Bowman, 149 U. S., 411.
12 Enc. Law and Prac. pp. 239, 240.
Burr's Case, Marshall's Const. Dec. pp. 82-165.
Palliser vs. U. S., 136 U. S., 256.
Horner vs. U. S., 143 U. S., 212.
Sands vs. State, 26 Tex. App., 580.
U. S. vs. Fowkes, 53 Fed. Rep. 13.
U. S. vs. Dietrich, 126 Fed. Rep. 664.

Eliason vs. Henshaw, 4 Wheat, 225.
National Bank vs. Hall, 101 U. S., 43.
Ry. Co. vs. Rolling Mills, 119 U. S., 151.
Chitty on Contracts, 11 Am. Ed., p. 15, note f.
Christian Co. vs. Bienville Co., 106 Ala., 124.
Tennessee Co. vs. Pierce, 81 F. R., 814.
Seitz vs. Brewers' etc. Co., 141 U. S., 510.

V.

There was No Evidence to Sustain Any Court of the Indictment.

(Assignments 27, 31, 43 and 44, Rec. pp. 274, 276 and 280.)

VI.

The agreement of the Defendant with the Rialto Company was for service by the month, and no service in the Department having been rendered during the period covered by the payment made March 26th there was no offense in the receipt of that payment.

(Assignments 27, 31, 37 and 40, Rec. pp. 274, 275, 279 and 280.)

Davis vs. Preston, 6 Ala., 83.
Matthews vs. Jenkins, 80 Va., 463.
La Coursier vs. Russell, 82 Wis., 265.
Benedict vs. U. S., 176 U. S., 357.
In re Hans Nielsen, 131 U. S., 188.

VII.

The Defendant was not subject to trial and punishment as for separate offenses in agreeing to receive and re-

ceiving compensation for the services charged in the Indictment to have been rendered by him.

(Assignments 27, 28 and 31. Rec. pp. 274 and 276.)

2 Bishop's New Criminal Procedure, Sec. 55.
1 Ibid., Sec. 436.
State vs. Jones, 106 Mo. 802.

VIII.

The juror William V. Jones was disqualified because he had formed and still retained an opinion as to the guilt or innocence of the Defendant, an opinion which was the result of reading the reports of the former trial, which reports he believed to be true, and the challenge to him should have been sustained.

(Assignment 4. Rec. p. 270.)

Lewis vs. U. S., 146 U. S., 370.
Williams vs. U. S., 93 F. R., 396.

IX.

The letters of Houts, Evans, Allen, Warner and Fravel, and the accompanying circulars and booklets, all of which were read in full, to the jury, were incompetent and irrelevant as against the Defendant, as he had no knowledge of them whatever, and their contents were not necessary to show the fact that some matter was pending in the department against the Rialto Grain and Securities Company.

(Assignments 7 to 15. Rec. pp. 270 to 272.)

Tappan vs. Beardsley, 10 Wall., 427.

X.

The endorsements on the jacket subsequent to March 26th, 1903, the Report of Inspectors Price and Piatt

of August 20th, 1903, and the letter of Assistant Attorney General Robb of September 9th, 1903, were competent and material evidence for Defendant to disprove the charges of the indictment that he had agreed to induce and had in fact induced the Postmaster General to issue no fraud order against the Company and to stop investigation of it, and also to show that the investigation being made by the Department was with reference to the indictment and prosecution of the Officers of the Rialto Company.

(Assignments 16, 17, 29 and 30. Rec. pp. 273, 274, 275 276.)

XI.

It was not competent for the witness Cochran to testify that he would have informed anyone on November 20th, 1902, whether or not there were complaints against the Rialto Company, but would not have given the names of the complainants, and that he gave them to the defendant because he was a United States Senator.

(Assignment 23, Rec. p. 274.)

XII.

The evidence of Francis C. Hubner should have been stricken out, as it established nothing and permitted the jury to conjecture that there had been an interview between the Defendant and the Assistant Attorney General for the Post Office Department relative to the affairs of the Rialto Company.

(Assignment 26. Rec. p. 274.)

XIII.

The instruction of the Court as to what would constitute service by the Defendant in the Department is not responsive to the charge of the Indictment, and authorizes a conviction on account of matters not alleged in the Indictment, and said charge is erroneous in other respects. The Court also erred in refusing to give instructions asked by Defendant.

(Assignments 35-37-38, Rec. pp. 277 and 279.)

Flachskamm vs. U. S., 127 Fed. Rep. 674.

XIV.

The Court at St. Louis had no jurisdiction to try Counts Three and Seven, nor is such jurisdiction conferred by Section 731, R. S. The District of Columbia is not a "Judicial Circuit" or "Judicial District" within the meaning of Section 731.

(Assignment 31, Rec. p. 276.)

ARGUMENT.

The United States was not a Party to nor Interested in the Proceedings Set Forth in the Indictment.

In the former case in this Court the point was made that the United States was not "interested" in the matter charged in the indictment in that case. The majority of the Court held generally that the facts alleged in the indictment showed a case that was covered by the provisions of section 1782, Revised Statutes, but there is no discussion at all in the Court's opinion with reference to the question of "interest" of the United States. The question was distinctly made and ruled on in the Circuit Court in the present case and decided against the defendant.

We maintain, *first*, that the present indictment does not state a case in which the United States is "interested" within the meaning of section 1782, Revised Statutes; and, *second*, that even if the indictment in the present case stated a case showing that the United States is interested, nevertheless the proof shows that Burton neither agreed to render nor did render any services in respect of any matter in which in any view the United States had any interest, direct or indirect.

This question has never been passed upon by this Court, nor has this Court laid down any principle by which any act of the defendant which is proved in this case could be held to be an act in which the United States had any interest, direct or indirect.

Section 1782 of the Revised Statutes was intended to apply only to cases to which the United States was a party or in which it had some pecuniary or property interest.

The law was enacted in 1864, during the Civil War, and the specific evils which called it forth were, the agency of

Senators and Representatives in procuring contracts with the Government, their advocacy of claims against it, and their appearance for defendants in military and naval tribunals. See Congressional Globe, first session 38th Congress, pp. 93, 460, 455, 555, 559, 561, 714, 2773.

It did not and could not have specific reference to fraud order proceedings, for they were not authorized by any law then in existence.

It is not contended that a statute is necessarily confined in its operation to the precise evils which were the occasion for its enactment, but only that these may properly be considered in determining its scope and effect.

The act in question is not unqualified in its terms. It does not prohibit appearance for compensation by a Senator in all cases in which the United States is a party or interested. It does not prohibit such appearance in all cases pending in a Department.

Appearance in a case to which the United States is a party or in which it is interested is not prohibited if the case is pending in a civil court, and appearance in a case pending in a Department is not prohibited if the Unted States is not a party and not interested.

The service for which there may be no compensation accepted by an official must be *"In relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any Department, Court Martial, Bureau, officer or any civil, military or naval commission whatever."*

The specification of "Department, court martial, bureau, officer or any civil, military or naval commission" excludes civil courts from the operation of the statute.

But there are other qualifying and limiting clauses, and they must be given some effect.

The service must be in relation to some "proceeding, con-

tract, claim, controversy, charge, accusation, arrest, or other matter or thing." Some of these words have a definite meaning. As to "contract, claim, controversy, charge, accusation and arrest" there can be no doubt. "Proceeding" and "matter or thing" are somewhat indefinite. For the ascertainment of their meaning the rules of *noscitur a sociis* and *ejusdem generis* are applicable. The associated words and the entire context suggest that the proceeding or matter or thing must be of the nature of a controversy, charge, accusation or arrest to which the United States is a party, or of the nature of a contract or claim in which it has an interest.

What now is meant by the United States being a party or interested? The term "party" has a distinct legal signification, and beyond a doubt it was used according to that signification in this Act. The Government might be a party to a contract or to a legal proceeding of some kind, designated as such in the agreement or proceeding. If so, the prohibition of the statute applies. But it has never been contended that the Government was a "party" to the proceeding here involved, and in none of the indictments presented has such an allegation ever been made.

It has been contended, however, that the United States was interested. But how? Was it interested in the sense contemplated by the statute? The word "interested" is used in immediate connection with the word "party," and it is to be presumed that it also was used in its fixed legal sense. The words have been frequently used by lawmakers in conjunction precisely as they are used here. Upon the occasion under consideration they were used by lawyers and primarily with reference to matters of a legal nature. The one word was certainly used in the sense, which in such context had always been attributed to it by the courts in the interpretation of statutes, and we must presume that the other word was used in like sense, that is, the sense which

in such context, had always been attributed to it by the courts.

What this legal meaning is admits of no doubt under the authorities. A pecuniary or proprietary interest is intended.

The case of Inhabitants of Northampton vs. Smith, 11 Metcalf (Mass.), 390, involved the construction of a statute of Massachusetts which provided, page 393, "that when a judge of probate shall be *interested* in any case within his jurisdiction, the case shall be transferred to the probate court of the most ancient adjoining county." The facts and the decision of the Court are sufficiently stated in the opinion of Chief Justice Shaw as follows (page 393):

> "This was an appeal from the decree of the judge of probate of the county of Hampshire, by which he declined, on account of interest, to take jurisdiction of the probate of the will of Oliver Smith, late of Hatfield, and directed the proceedings upon said will to be transferred to the court of probate of the County of Worcester, being the most ancient adjoining county. This objection is founded upon the provision of the Rev. Sts. c. 83, Sec. 15, directing that when a judge of probate shall be interested in any case within his jurisdiction, the case shall be transferred to the probate court of the most ancient adjoining county. The interest of the judge was supposed to arise from the fact, that he was one of the inhabitants of the town of Amherst; that there were, in this will, many bequests to charitable purposes, for the use and benefit of classes of persons described as dwelling in eight towns enumerated, of which towns Amherst is one; that if those bequests were beneficial to these towns, they had an interest, in their corporate capacity, in establishing the bequests, and of course in proving the will; and that by means thereof, Mr. Conkey, the judge of probate, as an inhabitant of Amherst and a member of the corporation, had a derivative interest in the same bequests.
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> (p. 394) "II. But the great question, and the one raised on the appeal, is, whether the judge of probate,

as an inhabitant of the town of Amherst, and a member of that municipal corporation, had such an interest in this will, within the meaning of the statute, as to supersede his jurisdiction of the probate of the will, and transfer it to another county.

"It is true that the plain dictates of natural justice, independently of all articles of magna charta, bills of rights, or other provisions of positive law, require that a man shall not be judge in his own cause. And it is only a just application of this principle, that he shall not sit in judgment in deciding a question in which he has a personal interest. But this, like all other very general propositions, in order to make it the basis of a practical rule, must have a reasonable construction, and must be taken, not as absolute and invariable, but with all necessary and implied qualifications. *If the term 'Interest' were used in the loose sense it sometimes is, consisting in a strong and sincere desire to promote all enterprises for the advancement of learning, philanthropy, and general charity, or a similar interest, with all good men, to repress and put down pernicious and mischievous schemes, no man could be found, fit to be intrusted with the administration of justice; for no man can be exempt from such interests.* But even where there are pecuniary interests, there must be some exceptions; as when the Commonwealth is a party in a criminal prosecution or a penal action, where the penalty enures to the State, and all civil suits on recognizances and other debts, or for the recovery of property, every citizen has a pecuniary interest. And yet none but citizens can be judges. Our own declaration of rights has made some approximation towards a limitation of the generality of the maxim, by declaring (art. 29) that 'it is the right of every citizen to be tried by judges as free, impartial, and independent, as the lot of humanity will admit.' It is obvious that no nearer approximation to the rule of absolute impartiality can be made, by any system of laws.

"We are then to consider what is the nature of the interest intended by Rev. Stat. c. 93, Sec. 15, which shall take the case out of the jurisdiction of the judge of probate, and transfer it to the court of probate of an adjoining county.

"1. We think it is not to be a mere possible, contingent interest; not an interest in the question or general subject, to which the matter requiring adjudication relates, but one that is visible, demonstrable, and capable of precise proof (Cottle, Appellant 5 Pick. 483; Sigourney v. Sibley, 21 Pick. 101, and 22 Pick. 507). It is not the bias or prejudice which would be sufficient to set aside a juror (Davis v. Allen, 11 Pick. 466). It is to be considered that such an interest, in the judge of probate, is not only to oust him of his jurisdiction, but is to confer jurisdiction on another court of proabte, which otherwise would not have it. It must therefore depend upon facts capable of being precisely averred and proved, and thus put in issue and tried. The importance of this consideration will be appreciated, when it is considered, that if jurisdiction is taken by a probate court, not entitled to it by law, the entire proceedings are void; the practical consequences of which may be extremely injurious (Holyoke v. Haskins, 5 Pick. 20; Coffin v. Cottle, 9 Pick. 287).

"2. It must be a pecuniary or proprietary interest, a relation by which, as a debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling, or sympathy or bias, which would disqualify a juror (Smith v. Bradstreet, 16 Pick. 264).

"3. It must be certain, and not merely possible or contingent (Hawes v. Humphrey, 9 Pick. 350; Wilbraham v. County Commissioners, 11 Pick. 322; Danvers v. County Commissioners, 2 Met. 185). It must be direct and personal, though such a personal interest may result from a relation, which the judge holds as a member of a town, parish or other corporation, where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings.

"*It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject matter, arising from feeling or sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a charac-*

ter would be too vague to serve as a test by which to decide so important a question as that of jurisdiction; it would not be capable of precise averment, demonstration and proof; not visible, tangible or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action. It is like the principle applying to the case of the competency of a witness; a direct pecuniary interest, however small, on being proved, renders him incompetent; but the strongest interest from sympathy, from interest in the question, and even an expected interest in the property in controversy, not yet vested, does not render him incompetent.

On examining this will of Oliver Smith, we cannot perceive that it vests any pecuniary interest, legal or beneficial, in the towns named, other than Northampton. The will provides for the future annual distribution of considerable sums of money in charity for the relief and assistance of various classes of indigent persons to be selected from those residing within the limits of these towns. But the distribution of a sum of money within the limits of a town, although it may give a spring to business, and indirectly benefit the inhabitants, as members of society, and holders of property, yet is not a direct pecuniary interest to the town in its corporate capacity, through which its members derive a pecuniary interest. And although it may be said, in a loose sense, that such a provision for various classes of persons, and the distribution of so much money, would be of great benefit to the town, and although the inhabitants of such town would feel strongly inclined to aid in promoting and establishing such a charity, and even be willing to pay money in securing it, yet, when strictly considered, it means only that such an establishment would be useful and beneficial to the dwellers in such town; not that it would confer any corporate right upon the town. It affords no direct or necessary exemption from taxes. It is the same interest which the inhabitants of a town often feel and manifest in the establishment of a college, academy, hospital, and even a court house and jail, within their limits.

> The Court are therefore of opinion that the town of Amherst as a municipal corporation, in its corporate capacity, takes no pecuniary interest, legal or beneficial, under this will, and that, of course, Mr. Conkey, Judge of Probate, as an inhabitant of that town, takes no such interest; that he is not prevented from taking jurisdiction of the probate of this will, and that no other probate Court of the Commonwealth can take jurisdiction of it.
>
> The decree of the probate court is reversed, and the case remitted to that Court for further proceedings in the probate of said will, and the settlement of the said Oliver Smith's estate."

A very pertinent case is that of McGrath vs. The People ex rel. Linnemeyer, 100 Ill. 464. The case and the decision on this point are stated accurately in the second paragraph of the headnote, as follows:

> "The State is not 'interested, as a party or otherwise,' in a proceeding in the nature of a quo warranto to try the title of a person to an office into which it was alleged he had intruded, in any such sense as would give to the Supreme Court jurisdiction to hear an appeal in such a proceeding directly from the trial court, under Section 88 of the Practice Act. The interest which the State must have in a cause, within the meaning of this section, in order to entitle either party to bring it directly to the Supreme Court from the trial court, is a substantial interest—as, a monetary interest."

This is directly contrary to the views taken by the trial Court in the present case. The trial Court in the present case held that the United States was interested in the question of the issuance of a fraud order, because of its general interest on behalf of the people that the laws should be enforced. In this quo warranto case of McGrath vs. The People the Illinois Supreme Court held that the State was not "interested, as a party or otherwise," in a quo warranto *to try title to an office created by the laws of Illinois.* This holding is utterly at variance with the holding of the trial Court in the present case, that a general interest or concern

that the laws should be enforced, is enough to make the United States Government "interested," within the meaning of Section 1782 of the Revised Statutes, in the question whether a person's mail should be stopped.

In the case of Evans vs. Eaton, 7 Wheaton 356, a question in this court was whether a Mr. Frederick was a competent witness, the alleged objection to him being that he was interested in the cause. This Court, however, held that he was not interested and that he was a competent witness. Mr. Justice Story, giving the opinion of the Court, said (page 425):

> "If the patent is declared void, the invention may be used by the whole community, and all persons may be said to have an interest in making it public property. But this results from a general principle of law, that a party can take nothing by a void patent; and so far as such an interest goes, we think it is to the credit and not to the competency of the witness."

It appeared in this case that Mr. Frederick was in a business where he might make use of the article alleged to be patented if the patent were to be declared void, and that in a certain sense he had an interest to having it declared void. On this point the Court, speaking by Mr. Justice Story, said (page 425):

> "But the special notice in this case asserts matter, which if true, and found specially by the jury, might authorize the Court to adjudge the patent void; and it is supposed that this constitutes such an interest in Frederick in the event of the cause that he is thereby rendered incompetent. But in this respect, Frederick stands in the same situation as every other person in the community."

In the case of State vs. Sutton, 74 Vt., 12, the case and decision are sufficiently stated in the following extract from the opinion of the Court:

> "This is an indictment under Section 5072 of the Vermont Statutes, for defaming this Court, and a judgment thereof, and the judges of the court as to said

judgment. It is objected that Judge Watson, who sat below, was disqualified by reason of interest in the event of the cause or matter, for that he is one of the judges alleged to have been defamed. It is a pecuniary interest that disqualifies, and Judge Watson is no more interested in this case in that respect than he is in every other criminal case that he tries, and that interest is too small for the law's notice. State vs. Batchelder, 6 Vt., 479. It is said that a judge defamed would be deeply interested to have the respondent convicted, not only that he might be severely punished, but also for the aid it might afford him in the prosecution and maintenane of a civil action for damages. But such an interest does not disqualify," etc.

In the case of Foreman et al. vs. Town of Marianna, 43 Arkansas, 324, the Court held that a judge who was a taxpayer in a town was not disqualified to sit in a case relating to the annexation of the town to a municipal corporation. On this point the Court said (page 329):

"It is objected here that the County Judge was disqualified, being a citizen and taxpayer of the town. It does not appear that his authority was challenged by any proper motion in the County Court, and we are free to say, that if it had been the objection ought not to have prevailed. It may be hoped that every good Judge in the State is deeply interested in everything that may help or hurt the community; and that he will favor the former and oppose the latter in all legitimate ways. Here the question is not one of taxes and burdens, but one of police. It does not even appear that, on the whole, the result of annexation, would be to increase or diminish taxes. But that is of no importance. This is not a suit of a personal nature, concerning property or rights of persons. A general interest in a public proceeding, which a Judge feels in common with a mass of citizens, does not disqualify. If it did, we might chance to have to go out of the State, at times, for a Judge. The interest which disqualifies a Judge, under the Constitution, is not the kind of interest which one feels in public proceedings, or public measures. It must be a pecuniary or property interest, or one af-

fecting his individual rights; and the liability or pecuniary gain or relief to the Judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of laws and government upon the status fixed by the decision."

In the case of Taylor et al. vs. Commissioners of Highways of Town of Normal, 88 Illinois, 526, the Court stated the question involved and the decision as follows (page 527):

"The only question of any importance presented by this record is, whether a person has a right to appeal from the decision of the commissioners of highways in laying out a new road or vacating an old one, who does not own land adjoining the road laid out or vacated.

The statute which authorizes an appeal from the decision of the commissioners of highways to three supervisors, provides, '*Any person or persons interested in the decision of the commissioners of highways* in determining to, or in refusing to lay out, alter, inclose or vacate any road, or revoking any previous order or decision relative to any road, or from the verdict of any jury in assessing damages in opening, altering or vacating any road, may appeal from such decision to three supervisors of the county,' etc. The word 'interested' must receive a reasonable construction, such as will, on the one hand, protect those who have a direct and substantial interest in the matter, and, on the other hand, protect the commissioners of highways from unnecessary litigation in defending their action as such, at the suit of persons who may imagine they have an interest, when in fact they have no such interest as was contemplated by the legislature. Every citizen of a county, in one sense, has an interest in the public highways. So, too, it may be said, and properly, that every citizen of the State has an interest in the highways in the different counties of the State. If, therefore, the language of the statute is to be interpreted literally, an appeal might be taken by any citizen of the State. But we apprehend it was not the intention of the legislature that the word "interested" should receive such a liberal construction. It was, doubtless, intended to give the right

of appeal to those persons who had a direct and pecuniary interest not shared by the public at large, such as owned land adjoining the new road laid out or the old one vacated. * * *

We are, therefore, of opinion that no person has the right of appeal except those who may own lands adjoining the road to be laid out or vacated."

Chicago, Burlington and Quincy Railroad Company vs. Kellogg, 54 Neb. 138, was a suit to vacate a judgment rendered against the railroad company in an action at law for damages. The facts are stated in the opinion of the Court as follows (page 404):

"The Honorable F. B. Beall was the judge who presided at the trial of the law case, and he also presided at the trial of the case at bar. When this case came on for trial, counsel for the railway company objected to Judge Beall hearing it, claiming that he was interested, and therefore disqualified from hearing this case. The railway company's objections were overruled, and Judge Beall heard and determined the case at bar; and this action is the first argument made here for a reversal of the judgment. Sections 37, c. 19, Comp. St., provides that: "*A judge * * * is disqualified from acting as such * * * in any case wherein he is interested* * * *" But the word "interested," found in this section of the statute, probably means "pecuniarily interested," or at least it means that a judge, to be disqualified from hearing a case, must be in such a situation with reference to it or the parties that he will gain or lose something by the result of the action on trial. It is not claimed that Judge Beall will gain or lose anything from the result of this action. It is not pretended that he has any pecuniary interest in the matter. The argument seems to be that, because he rendered a law judgment, he would naturally be desirous that the same should be sustained, and that, therefore, his inclination would be to defeat this suit. It can never be presumed that a judge will permit his desires or inclinations to control his decision in any manner; and that he tried the case and rendered the judgment which is sought to be vacated by this action does not render him

whether the driving of living fat oxen was *"transporting"* such oxen within the meaning of the statute, and the Court held that it was not. The language of the statute was (page 120):

> "That if any citizen of the United States, or person inhabiting the same, shall transport or attempt to *transport* overland or otherwise, in any wagon, cart, sleigh, boat, or *otherwise*, naval or military stores, arms or munitions of war, or any article of provisions from the United States to Canada," etc.

The Court held that living fat oxen were articles of provision and munitions of war. The Court, however, held that the driving of oxen overland was not *"transporting"* them in any wagon, cart, sleigh, boat, or *otherwise."* This case furnishes a very pertinent illustration of the rule that in order that an act may be construed to be within a penal statute, it must clearly be within it, and that courts will never construe an act as within the statute unless it is clearly so. In this case the evil consequences of the act to the United States were just as great, whether the cattle were driven overland on foot or whether they were carried in wagons, but the Court, of course, held that it could not punish the act unless it was clearly within the statute.

So in the case of the United States vs. Morris, 14 Peters, 464, a case of indictment under a statute prohibiting the slave trade, this Court, Mr. Chief Justice Taney giving the opinion, said (page 475):

> "In expounding a penal statute the Court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly."

In the case of the United States vs. Clayton, 2 Dillon, 218, the Circuit Court (Dillon and Caldwell, J. J., sitting) held that Powell Clayton, Governor of the State of Arkansas, was not an "officer of election," within the meaning of a penal act of Congress, although it was a part of his duty

to issue and he did issue a certificate of election. The Court said (page 225):

> "It belongs only to the legislative department to create crimes and ordain punishments. Accordingly, courts, in the construction of statutable offenses, have always regarded it as their plain duty cautiously to keep clearly within the expressed will of the legislature, lest otherwise they shall hold an act or an omission to be a crime, and punish it, when, in fact, the legislature had never so intended. 'If this rule is violated,' says Chief Justice Best, 'the fate of the accused person is decided by the arbitrary discretion of the judges and not by the express authority of the laws.' (Fletcher vs. Lord Sondes, 3 Bing., 580.)
>
> The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and clearly embraced in their terms, is one of great importance to the citizens. The courts have no power to create offenses, but if by a latitudinarian construction they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. Of course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere verbal and sharp criticism, nevertheless the doctrine is fundamental in England and American law, that *there can be no constructive offenses; that before man can be punished his case must* be plainly and unmistakably within the statute, and if there be any *fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused.* These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the Supreme Court of the United States (United States vs. Morris, 14 Pet., 464; United States vs. Wiltberger, 5 Wheat., 76; United States vs. Sheldon, 2 Ib., 119; and see also Ferret vs. Atwill, 1 Blatch., 151, 156; Sedgw. Const. and St. Law, 324, 326, 334; 1 Bish. Cr. Law, Secs. 134, 135)."

A crime consists of matters of fact and the definition of a crime consists of the enumeration of those matters of fact which constitute the offense. The things thus enumerated must all of them be alleged and proven as facts. In the present instance the facts enumerated and which must be alleged and proven are that, (1) the defendant was one of the officials named, (2) he received or agreed to receive compensation, (3) this compensation was for services rendered or to be rendered by him, (4) the services were in relation to a proceeding, etc., (5) the United States was a party to or interested in the proceedings, and (6) the proceeding was before some Department of the Government.

Each and every one of these elements of the offense is an element of fact, to be alleged and proven as a fact, and no one of them more than any other arises as a presumption of law from any or all of the other elements. There is no presumption of law that the defendant in any case under this statute was an official, because he received compensation for services rendered in a proceeding pending in a Department of the Government to which the United States was a party or in which it was interested. There is no presumption of law that he received the compensation because he rendered services. None that the proceeding was pending before a Department because the United States was interested or a party and none that the United States was interested or a party because it was pending in a Department.

There was an attempt to allege all these various facts in the indictment, whether efficiently done is another matter, and there was an attempt to prove, ineffective as we insist, all these various facts, save that the United States was interested, and this essential fact, made by the statute one of the constituent facts of the offense, was presumed as a matter of law from the fact that the proceeding was pending in a Department. It is no answer to say that the interest of the Government was shown by the nature of the proceeding,

when the proceeding is of such nature that to hold the Government to be interested is to hold it interested in every proceeding and in every matter or thing that may be before any Department. We must follow the definition of the statute, we must give effect to every element of that definition, or else we take from the statute a qualification and limitation and so broaden its scope and make that an offense which the lawmakers have not declared to be so.

In behalf of the defendant we have applied to the word "interested," a word used by lawyers and with reference to lawyers, the sense in which it has been used as determined by the courts, in every statute in which it is found in similar association and context, and unless it has the meaning thus ascribed to it, it has no meaning whatever.

II.

The Indictment States no Facts Showing the Pendendy of any Proceeding in the Postal Department.

The allegations of the sixth count, which may be taken as an example of all, in respect of the proceeding is:

> "That before and on the day in this count first aforesaid there was pending before the Post Office Department of the said United States and before a certain officer of that Department, to-wit, the then Postmaster General of the said United States, a certain proceeding in which the said United States was then indirectly interested, that is to say, a proceeding for determining the questions whether the said corporation was engaged in conducting a scheme for obtaining money from persons then resident in divers parts of the said United States, through the mails of the said United States, by means of false and fraudulent pretenses, representations and promises made by the said corporation to those persons, to the effect that it would invest such moneys as should be sent to it for investment in grain, and endeavor in good faith so to invest such moneys in grain

as speedily to make substantial profits for the persons so sending the same, and account for said moneys to said persons and not convert said moneys to its own use, —and whether the said Postmaster General should instruct the Postmaster at the Post Office of the said United States at St. Louis aforesaid, the same then being a Post Office at which registered letters were then arriving, directed to the said corporation, to return all such registered letters to the several postmasters at the several Post Offices at which they were or should thereafter be originally mailed, with the word 'fraudulent' plainly written or stamped on the outside thereof, to be by such postmasters returned to the writers thereof under the regulations of the said Post Office Department, and in the same manner to dispose of all other letters and matter sent by mail to the said Post Office directed to the said corporation, all of which the said Postmaster General might then have lawfully done, upon evidence satisfactory to him that the said corporation was engaged in conducting such a scheme to defraud as that in this count mentioned; and, further, that before and on the day in this count first aforesaid the facts pertaining to the questions in this count mentioned were under investigation by the said Post Office Department and the said Postmaster General, and on that day were still undetermined by the said Postmaster General."

The sufficiency of this allegation was appropriately challenged by demurrer.

The statute makes the pendency of a proceeding an essential element of the offense. The indictment charges in one series of counts that the proceeding was pending when the agreement for compensation was made, and in the other series that it was pending when the compensation was received.

It will be observed that the only charge of this element of the offense is the bald statement of the pleader's conclusion that the proceeding was then pending. No facts are averred from which the conclusion of pendency may be deduced, and so the defendant was denied the protection of

the Sixth Amendment to the Constitution, and was not informed of the nature and cause of his accusation.

In United States vs. Hess, 124 U. S. 483, which was upon the construction of an indictment under section 5480, the Court said:

> "The Statute upon which the indictment is founded only describes the general nature of the offense prohibited, and the indictment in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issues could be formed for submission to a jury. * * * The statute is directed against 'devising or intending to devise any scheme or artifice to defraud' to be effected by communication through the Post Office; *as a foundation for the charge* a scheme or artifice to defraud must be stated * * * with all such particulars as are essential * * * to acquaint him with what he must meet on trial. * * * The object of the indictment is, first: to furnish the accused with such a description of the charge as will enable him to make his defense * * * and, second: to inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had, for this, *facts are to be stated*, not conclusions of law alone."

As a scheme or artifice to defraud is *the foundation* for the charge under section 5480, so the pendency of a proceeding is *the foundation* of a charge under section 1782.

As it is essential under section 5480 to set forth the facts constituting the scheme to defraud, so it is essential under section 1782 to set forth the facts showing that a proceeding was pending in the Department, it being necessary in each case that the defendant may be enabled to make his defense, and that the court may determine whether the facts alleged are sufficient in law to support a conviction.

A proceeding may be said to be pending before a tribunal, whether the same be a court of law or an executive officer exercising quasi judicial power to hear and determine the

same, when certain things have been done by which *the matters or things to be determined are ascertained and take concrete form*, and by which they are brought *under the control of the tribunal for determination*. When these exist, the legal presumption of pendency arises, and only by the application of the law to such facts can this conclusion arise.

For example, a criminal case becomes a matter pending when a Grand Jury has returned an indictment, or an information has been filed. A mere purpose on the part of the authorities to prosecute, which has not taken proper concrete shape, would not sustain a charge of pendency.

Post vs. United States, 161 U. S., 583.
Virginia vs. Paul, 148 U. S., 107.

In a civil suit the filing of a petition or a declaration begins the proceeding and thenceforth it is pending. Illustrative of this is the form of the common law plea of another action pending which is always pleaded: "And the defendant comes and defends the wrong and injury, when, etc., and prays judgment, etc., because he says that before the issuing of said writ, to-wit: on, etc., in the same court (or other court) the plaintiff impleaded the defendant *and issued his said writ and filed his declaration against him*, etc."

The modes of procedure in the Postal Department may be very different from those obtaining in criminal prosecutions or civil suits, but some mode of procedure there must be. Something must be done to institute a proceeding, some concrete facts must exist in order that the proceeding may be a pending one.

The question to be determined in a proceeding is not the proceeding itself, no more than the questions in a case are the case. The questions arise as a consequence of instituting the proceeding or the suit. If the Postmaster General was simply considering whether or not the Rialto Grain and Se-

curities Company was engaged in a scheme for obtaining money through the mails by means of false pretenses, this would be but a question in his mind, and not a proceeding in the Department.

If it be assumed that the Postmaster General might of his own motion formulate, take jurisdiction of and determine such question, then that he had done so should have been averred, and an opportunity given the defendant to know what state of facts he must meet, controvert or avoid.

If it be assumed that any person, or any one of a specific class of persons, or some particular official might institute the proceeding by filing a complaint or formulating the question to be decided, and presenting the same to the Postmaster General, then that would be the state of facts from which the pendency might be said to arise, and would constitute the facts of which the defendant had the constitutional right to be informed.

If the Postmaster General had, in pursuance of law, formulated regulations declaring the procedure under which said proceeding should be *brought into being*, and such regulations had the force and effect of law, and were exclusive of all other methods of instituting and conducting such proceedings, then an averment of such acts as these regulations required to be done to institute such proceedings should have been made in the indictment, to the end that the defendant might prepare his defense thereto, and that the Court might, by an examination of the acts averred and a consideration of the regulations made, determine whether or not the conclusion of pendency was established by the averment of facts. And although the trial court overruled the demurrer of the defendant, yet at the close of the trial it gave distinct recognition of the principle that pendency was a conclusion of law by instructing the jury as a matter of law from what facts the conclusion of pendency should be deduced. (Record p. 258, par. 3.)

The power and jurisdiction of the Postmaster General to hear and determine such a question as in the indictment is set out, arises from sections 3929 and 4041 Revised Statutes, as amended by Act of 1890.

The authority given by the statute to the Postmaster General is *to find upon evidence satisfactory to him* that a person or company is conducting a scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, *and upon such finding to issue an order* as the statute directs.

> "The officer exercises the same quasi judicial functions which have been exercised by the various executive departments since the foundation of the Government, in that he hears proof and decides issues of fact as well as questions of law."
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> American School of Magnetic Healing vs. McAnulty, 102 Fed. Rep., 565, 568.
>
> Dauphin vs. Key, 11 D. C., 203.
>
> Enterprise Savings Association vs. Zumstein, 64 Fed. Rep., 837. Affirmed, 67 Fed. Rep., 1000.

Congress has vested this power, that is, the power referred to in sections 3929 and 4041 Revised Statutes, in the Postmaster General, and it is an exclusive lodgment of power. One which the courts cannot assume or interfere with without defeating the legislative will expressed in the statute, that the same *shall be exercised by the Postmaster General, with whom the power is exclusively lodged.*

> Bates & Gould vs. Payne, 194 U. S., 106.
>
> Public Clearing House vs. Coyne, 194 U. S., 297.
>
> United States vs. Ju Toy, 198 U. S., 253.

It being practically beyond controversy that the power is a quasi judicial one, involving the exercise of judgment and discretion, that it cannot be assumed by the Courts or by

any other tribunal without defeating the legislative will as expressed in the statutes, it follows that the power to hear and determine the question, averred in the indictment to be pending, is a power which cannot be delegated, and it necessarily follows that such a question, if lawfully pending anywhere, must have been pending before the Postmaster General *exclusively,* and that the allegation in the several counts of the indictment that "there was pending before the Post Office Department of the United States and before a certain officer of that Department, to-wit, the then Postmaster General of the United States, a certain proceeding, etc.," must be construed to mean that said proceeding was pending *exclusively* before the Postmaster General, and not to mean a duality of places or persons at which or before whom the said proceeding was pending.

There can be no pretense that the alleged proceeding referred to in the indictment has any legal authorization other than flows from sections 3929 and 4041 of the Revised Statutes, or that it means any other proceeding than that authorized by said statutes, nor can it be contended that such a proceeding can pend for determination before any person other than the Postmaster General, and, although, the officers and employes of the Post Office Department might properly be engaged in preparing such a case to be thereafter presented to the Postmaster General, or might be engaged in obtaining evidence at his request to present to him in support thereof, yet in no sense could it be said to be pending before such officers or employes, or before the Post Office Department, because no power to determine rests in them.

The postal laws and regulations prescribe the manner in which the pendency of a proceeding of the nature referred to in the indictment may be instituted, and they make that method exclusive.

Sections 3929 and 4041 Revised Statutes confer upon the

Postmaster General the jurisdiction to hear and determine the matters referred to.

Section 338 Revised Statutes provides "There shall be at the seat of Government an executive department to be known as the Post Office Department, and a *Postmaster General, who shall be the head thereof.*"

Section 161 Revised Statutes of the United States provides: *"The head of each department* is authorized to prescribe regulations not inconsistent with law and for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it."

Regulations made by the head of an executive department pursuant to the section last above quoted are of the force and effect of law.

United States vs. Eaton, 144 U. S., 677.

Sections 3929 and 4041 Revised Statutes of the United States have conferred upon the Postmaster General certain power and jurisdiction, but have fixed no particular method or course of procedure by which such jurisdiction shall be invoked and exercised by him.

Pursuant to the authority contained in section 161, the Postmaster General has provided regulations, which have the force and effect of law, prescribing the manner and method by which this jurisdiction shall be invoked, that is to say, he has fixed and determined the rules of procedure and the acts to be done and the things that must exist in order to invoke such jurisdiction and to bring any of the matters within the purview of such statutes into a condition of pendency before him.

These regulations have the force and effect of law when regularly made and promulgated, and the Courts are bound to take judicial notice of them when brought to their attention.

Caha vs. United States, 152 U. S., 211.

The regulations having any bearing upon the issuance of a fraud order are:

"Sec. 15. That the business of the Department may be properly transacted and conveniently arranged *and prepared for the final action of the Postmaster General when necessary*, it is distributed among its several officers as hereinafter provided."

P. L. & R. 1902, p. 20.

Sec. 16. The Postmaster General assigns to his office; the superintendence and government of the Department, the appointment of the officers, clerks and employes, the general direction of the postal service in all its branches, the management of its finances and disbursements of appropriations, the submission of cases to the President relating to the appointments to be made by him, the determination of appeals from the action of the several assistant postmasters general, the promulgation of rules and regulations, the consideration of claims of postmasters for credit or reimbursement for losses by fire, burglary, or other unavoidable casualty, the issuance of all orders requiring the formal approval of the Postmaster General, the custody of the official seal, *and the performance of all special duties enjoined by law upon the Postmaster General.*"

Id.

Paragraph 6 of section 20, P. L. & R., provides:

"The Division of Post Office Inspectors * * * is charged * * * with the *preparation and issue of all cases for investigation* * * * with the safe custody of money and property collected or received by Inspectors and *the preparation of cases* for submission to the Postmaster General for orders for the restoration thereof to the proper parties or owners."

"Sec. 21. The Assistant Attorney General is charged with the duty of giving opinions to the Postmaster General or the heads of the several offices of the Department upon questions of law arising upon the construction of the postal laws and regulations, or otherwise, in the course of business in the postal service; * * * the keeping and preparation of all correspondence with the Department of Justice relating to prosecutions and suits affecting or arising out

The special plea of the defendant in bar, the replication of the United States thereto, the demurrer to the replication, and the judgment of the Court thereon, appear in the record pages 20-30, inclusive, and are referred to in the statement of facts in this case, *supra.*

We beg that it specially be noted that the replication, or as it is styled—"amended answer to plea in bar," does not deny any of the allegations of fact stated in the special plea in bar, and therefore the said allegations of fact stand admitted on the record as true.

The undisputed facts are, that as to the payment of $500 on the 26th of March, 1903, said $500 was paid by W. D. Mahaney, vice-president of the Rialto Company, to Burton; that there was no other payment of $500 made by either the Rialto Company or Mahaney to Burton; that the money with which payment was made was the money of the Rialto Company, and that it was paid to Burton on account of the Rialto Company and not on account of Mahaney or any one else. In short, there was but one transaction in respect of this payment of $500.

In the indictment in the former case, the allegations of counts one and two were to the effect that this money was received from the Rialto Grain and Securities Company, and the allegations of count three in the former indictment to the effect that it was received "from one W. D. Mahaney, an officer and employe of the Rialto Grain and Securities Company, as compensation for services rendered by him, the said Joseph Ralph Burton, senator as aforesaid, to the Rialto Grain and Securities Company." The plea in bar alleges that this count three of the former indictment is "identical in law and in fact" with counts one and two so far as this payment was concerned; and the said plea in bar further alleges that the said $500 in each and all of the counts is the same $500, and not any other or different sum of $500.

On the trial in the former case the Judge directed a verdict of "not guilty" on said third count of the indictment, stating at the same time (Record in former case, page 235):

> "The third count wherein it is charged that the accused on March 26, 1903, accepted and received from an officer and employe of the Rialto Grain and Securities Company the sum of $500 for services rendered the Company before the Department is practically the same as the first count. It was obviously intended by the pleader for the purpose of informing the accused of the medium through which the money was received from the Rialto Grain and Securities Company, and if there is a verdict of guilty on the first and second counts, there should be no conviction on this third count because, as already stated, it is but another way of charging the same offense as is charged in the first and second counts."

Accordingly, the jury on the former trial, under the direction of the Court, rendered a verdict of "not guilty' on said third count.

The only way in which the United States Attorney undertook to meet this plea in bar appears in the record in the present case (page 29), in the so-called answer to said plea in bar, where said Attorney alleged:

> "And the United States further answering says, that the offense charged against said defendant Joseph Ralph Burton in said counts three and seven of the indictment herein is identical in legal effect with the offense charged in said counts one and two of the said original indictment, but the offense charged against the said defendant in counts three and seven herein is not identical in legal effect with said count three of said original indictment, as will appear from an examination of said counts."

The Court held in accordance with this view of the District Attorney, and adjudged that the plea in bar was not well taken, and overruled and denied the same (page 29). The only difference which exists between count three of the

original indictment on the one hand, and counts one and two of the original indictment and counts three and seven of the present indictment on the other hand, is in the allegation that this $500 was received from W. D. Mahaney, an officer and employe of the Rialto Grain and Securities Company, instead of the allegation that it was received from the Company itself. The trial Court in the former case, as is shown by the above quotation from its opinion (see record former case, page 235), held that the allegation was identical in law and in fact. The trial court in the present case held that the allegation of this payment of Mahaney, an officer and employe of the Company, was not the same thing as an allegation that this money was paid by the Company; and that an acquittal of the charge of receiving the money from Mahaney, an officer and employe of the Company, was not an acquittal of the charge of receiving it from the Company. The Court held this, although confessedly and indisputably there was but one payment, and that made by Mahaney, which fact appears and is expressly alleged in the plea in bar, and not denied by the reply or answer of the United States. Furthermore, the proof in this case shows that payment of said $500 was made by Mahaney, an officer and employe of the Company; that the money so paid was the Company's money (evidence of *Carr*, secretary of the Rialto Company, page 146, 147; and of *Mahaney*, vice-president of the Rialto Company, page 148).

Moreover, if in law the payment by Mahaney is not the same thing as a payment by the Company, then the Government is in the predicament of not having proved its fundamental allegations of counts three and seven of the present indictment, because their only proof is that the money was paid by Mahaney; and therefore if, as the Court held in this case, contrary to what was held in the former case, such payment is not a payment on behalf of the Rialto Company to Burton of the $500, then the fundamental allegation in

this case, that Burton was paid $500 by the Rialto Company, utterly fails.

The law is well settled, however, by numerous cases that an act done by an officer or agent of a corporation is equivalent to an act done by the corporation itself.

See on this point—

Baldwin vs. Bank of Newbury, 1 Wall. 234.
Mechanics Bank vs. Bank of Columbia, 5 Wheat. 326.
Ford vs. Williams, 21 How. 289.
New Jersey Steam Navigation Co. vs. Merchants Bank, 6 How. 381.
Commercial Bank vs. French, 21 Pick. 486.
Dugan vs. United States, 3 Wheat. 172.

See also numerous other cases collected in 2 Daniel on Negotiable Instruments (1st Ed.) sections 1187-1189.

The present case is much plainer than these cases, where it has been repeatedly held that an act done by, or an instrument payable to, an agent, even if the corporation is not named, is an act done by, or an instrument payable to, the Company.

That the plea in bar was good, and that the Court erred in holding it to be bad, is clearly sustained by the uniform line of adjudications, some of which we proceed to refer to.

In State vs. Cooper, 13 N. J. Law 361, the defendant had been indicted and convicted of arson, and later he was indicted for the murder of a man who was burned to death in the house. His plea of former conviction was held to be good, the Court saying, "It is sufficient if an acquittal of the one would show that the defendant could not have been guilty of the other." So in Hurst vs. State, 86 Ala. 604, it was held that a person aiding in the escape of two prisoners by one act, one of the prisoners being charged with misdemeanor and the other with felony, may plead conviction for

aiding in the escape of the first in bar of an indictment for aiding in the escape of the second.

The rule we invoke is that laid down by Cooley in his Constitutional Limitations, 7th Ed., p. 470, viz:

> "If the first indictment or information were such that the accused might have been convicted under it on proof of the facts by which the second is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against a trial on the second."

The same rule is declared in People vs. McGowan, 17 Wend., 386.

Code Section 3803 of Alabama made it a crime for any officer to apply to his own use any of the revenue of the State. Section 3805 made it a crime for any probate judge, tax collector or constable to apply to his own use any money paid into his office. In Monroe vs. State, 111 Ala., 15, the defendant was indicted, tried and acquitted under Section 3805, and this was held to be a bar to prosecution under Section 3803, when it appeared that the funds, the conversion of which was charged was identical.

The accused cannot be deprived of the benefit of the Constitutional provision by splitting one transaction into several offenses. In United States vs. Lee, 4 Cranch, C. C. 446, the defendant was indicted for stealing a pocket book and a promissory note. He was convicted as to the pocket book, but because of a misdescription was acquitted as to the note. Later he was again indicted for stealing the note, it now being properly described. It was held that if the note was in the pocket book, the defendant should be acquitted.

And the question does not depend upon the validity of the first indictment. In United States vs. Ball, 163 U. S. 662, several defendants were indicted for murder. One was acquitted and the others were convicted and they appealed. The indictment was held to be bad, and the case reversed. They were all indicted again and pleaded former

jeopardy, and the plea was held to be good as to the one acquitted.

Nor does it matter how the acquittal was brought about in the first case.

In United States vs. Nickerson, 17 How., 204, the defendant was charged with perjury and was acquitted because of an erroneous ruling of the judge. He was again indicted for false swearing to the same fact, but the former acquittal was held to be a bar.

A careful examination of the Nickerson and Ball cases and the principle on which they rest, show that they are a full support for the sufficiency of Burton's plea of former jeopardy.

In Mitchell vs. State, 42 O. S., 384, the defendant was indicted for shooting B. with intent to kill. On the trial the Court erroneously held that because the defendant did not shoot B., although he shot at him, he could not be convicted, and the jury was discharged. The defendant was then indicted for shooting at B. with intent to kill, and it was held that the plea of former jeopardy was good.

Where there are several counts in the indictment, and a conviction on some of them and an acquittal on the others, and there is an appeal from and a reversal of the conviction, the acquittal stands, and this whether it was intended to charge the same transaction or entirely distinct offenses. The verdict of acquittal is absolute and unchangeable as the laws of the Medes and Persians. It is not reversible; it is not subject to appeal.

Campbell vs. State, 9 Yerger, 333.
State vs. Martin, 30 Wis., 216.
Stuart vs. Comm., 28 Gratt., 950.
Gunther vs. People, 24 N. Y., 100.
Morris vs. State, 8 S. and M., 762.
State vs. Kattleman, 35 Mo., 105.
State vs. Kibble, 2 Tyler, 471.

This Court in United States vs. Ball, 163 U. S. 662, said, p. 670:

> "The former indictment set forth a charge of murder, although lacking the requisite fullness and precision. The verdict of the jury, after a trial upon the issue of guilty or not guilty, acquitted Millard F. Ball of the whole charge of murder, as well as of any less offense included therein. Rev. Stat. 1035."

And on p. 671:

> "The verdict of acquittal was final and could not be reviewed on error or otherwise without putting him twice in jeopardy and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense. United States vs. Sanges, 144 U. S. 310; Commonwealth vs. Tuck, 20 Pick. 356, 365; Wets vs. State, 2 Zabriskie, (22 N. J. Law), 212, 231; 1 Lead. Crim. Cas. 532."

In this case the defendant filed his plea in bar of the third and seventh counts of the indictment and set forth therein that he had been previously tried for and acquitted of the offense charged in these counts. In his plea he set out the third count of a former indictment, which charged him with having been, on the 26th day of March, 1903, a Senator of the United States, and with having on that day accepted and received from one W. D. Mahaney, an officer and employe of the Rialto Grain and Securities Company, five hundred dollars as compensation for services rendered by him to said Company in a proceeding against it pending in the Postal Department of the United States, in which the United States was interested.

The seventh count of the present indictment charges the defendant with having been, on the 26th of March, 1903, a Senator of the United States, and with having on that day accepted and received from the Rialto Company, through its officers, agents and attorneys, five hundred dollars as compensation for services rendered by him to said Com-

pany in a proceeding against it pending in the Postal Department of the United States, in which the United States was interested.

The plea averred that the defendant in the first case and the defendant in this case is the same man; that the Rialto Company is in each case the same corporation; that the proceeding pending in the Department is in each case the same proceeding; that the services rendered are in each case the same services; that the money received was in each case the same money; and that the money was in fact paid to the defendant by W. D. Mahaney, an officer and employe of the Rialto Company.

Absolute identity of transaction is alleged and shown by the plea, and no issue of fact was joined upon it. There was no room for controversy as to the facts, for these were thoroughly understood by all concerned. The question was considered by counsel upon both sides as one of law.

The sole difference between the indictment relied upon in the plea, and that to which the plea is filed is in the statement as to the receipt of compensation by the defendant. And this difference is not as to the fact stated, but merely in the form of stating it. In the first it is said that the defendant did "take, accept and receive from one W. D. Mahaney, an officer and employe of the Rialto Grain and Securities Company the sum of Five Hundred Dollars" as compensation for services rendered the Company in a proceeding against it. In the present indictment it is said that he did "receive directly from the said corporation, through its officers, agents and attorneys, certain compensation for the same services, that is to say, five hundred dollars," etc.

It is alleged in the plea, and it is true, that the payment was made by W. D. Mahaney; that Mahaney was an officer of the Company and that in making the payment he was acting for the Company and used the money of the Com-

pany. To distinguish the two indictments, the prosecution relies upon the difference between receiving money from a corporation through an officer, and receiving money from an officer of the corporation. But in each case the same money, the same corporation, and the same officer, and in each case the business of the corporation involved. If such distinctions could serve to differentiate, there would be no end of jeopardy.

The prosecution answers that the entire case has not been stated; that while the plea in bar was not denied, still the replication set out other and additional facts which avoided the plea.

The replication avers that there were three counts in the former indictment.

The first count charged that the defendant, being a United States Senator from the State of Kansas, did at St. Louis, Missouri, on the 26th of March, 1903, receive from the Rialto Grain and Securities Company, a corporation of the State of Missouri, the sum of five hundred dollars as compensation for services rendered by him to the Company in a proceeding then pending before the Postal Department of the United States, in which the United States was directly interested.

The second count was the same as the first, except that it charged that the United States was *indirectly* interested in the proceeding.

Upon these two counts it is alleged the defendant was convicted, prosecuted an appeal, and secured a reversal. And the replication concludes that the offense charged against the defendant in counts three and seven of the present indictment "is identical in legal effect with the offense charged in said counts one and two of said original indictment, but that the offense charged against the defendant in said counts three and seven of the indictment herein is not identical in legal effect with said count three of said original indict-

ment, as will appear from an examination of said counts."

It appears from the plea in bar and the replication that counts one, two and three charged the same transaction as an offense. The replication asserts that counts one and two of the first indictment are identical in legal effect with counts three and seven of the present indictment, but that count three of the first indictment is not so. It would follow from the averments of the replication that if the acquittal at the first trial had been on count one or two, the plea in bar would be good.

But count three of the first indictment is identical in every point of fact with counts three and seven of the pending indictment. The District Court, on the trial of the first case, in effect so held, for it held this count to be practically the same as one and two of the original indictment.

The Court charged the jury in that case as follows:

> "The third count wherein it is charged that the accused on March 26, 1903, accepted and received from W. D. Mahaney, an officer and employe of the Rialto Grain and Securities Company, the sum of Five Hundred Dollars, for services rendered the company before the Department, is practically the same as the first count.
>
> It was obviously intended by the pleader for the purpose of informing the accused of the medium through which the money was received from the Rialto Grain and Securities Company, and if there is a verdict of guilty on the first and second counts, there should be no conviction on this third count, because as already stated, it is but another way of charging the same offense as is charged in the first and second counts." (Page 235, Record of former case.)

In Dealy vs. United States, 152 U. S. 539, the Court said:

> "It is familiar law that separate counts are united in one indictment, either because entirely separate and distinct offenses are intended to be charged, or because the pleader, having in mind a single offense, varies the statement in the several counts, as to *the*

manner of its commission, in order to avoid at the trial an acquittal by reason of any unforeseen lack of harmony between the allegations and the proof. Bishop Crim. Proc., par. 422. Yet, whatever the purpose may be, each count is in form a distinct charge of a separate offense, and hence a verdict of guilty or not guilty as to it is not responsive to the charge in any other count. Take the case of an indictment for murder. Suppose in one count the homicide is charged to have been committed by means of a blow from a pick-axe, and in another by a shot from a pistol. While from the name of the deceased and the time and place of the killing it may be inferred that the same homicide is in the mind of the pleader, yet such inference is not, as a matter of fact, conclusive, and, as a matter of law, is overthrown by the dissimilarity in the means of homicide, and it certainly would be a novelty in criminal practice to have a verdict returned upon such indictment, finding the defendant guilty under one count and not guilty under the other adjudged a verdict of not guilty, as to both.

In the case at bar the section of the statute under which this indictment was found requires not merely a conspiracy, but some act to carry into effect its object. This act is only one of the means by which the conspiracy is sought to be carried into effect, just as in the illustration given, the blow of the pick-axe and the shot from the pistol are means for the accomplishment of the homicide and a verdict of not guilty as to any one of the counts in this indictment is not necessarily a finding against any conspiracy, but only that the conspiracy and the overt act therein stated did not both exist, while a verdict of guilty upon any other count finds both the conspiracy and the overt act named therein."

It is manifest here that one and the same offense was intended in all of the counts, and different counts were properly included in the indictment only in so far as they were different statements of fact as to the manner and means of the commission of the offense. It is not proper to cumulate counts in an indictment except to charge different offenses

or to meet various possible phases of proof. A defendant should not be burdened and prejudiced by repeated charges of the same offense in different phrase, without difference of fact, and his conviction secured by sheer dint of accusation.

If the very same facts are charged in two counts, and there is a verdict of guilty on one count and of not guilty on the other, the two verdicts are repugnant and cannot stand together. And in such case the verdict of guilty must fall, for it is subject to be set aside, while the verdict of not guilty remains.

In the illustrative case cited by the Court, in Dealy's case, *supra*, if the defendant were acquitted on the count charging the murder to have been committed by a pick-axe and convicted on that charging it to have been committed by a pistol shot, and the verdict of guilty were then set aside, the defendant could not again be tried upon the first count of the original indictment, and much less could he be charged by a new indictment with having committed the same offense in the very same manner, and by the very same means.

In Dealy's case the indictment was for conspiracy. There were many counts, but the conspiracy charged was the same; the overt act, however, charged in each count was different. There was no finding by the jury upon one of the counts which the Court held tantamount to an acquittal, and counsel for Dealy contended that this operated as an acquittal on all the counts, because only one offense was charged. The contention was that the verdict of acquittal negatived the existence of every fact charged against the defendant in this count as an element of offense. The Court answered that the effect of the acquittal was only that the conspiracy and the overt act stated in the count to which it applied did not both exist, while the verdict of guilty upon another count found both the conspiracy and the overt act named therein.

received, he thereby agreed to receive, and further the allegation is that he "knowingly" and "wilfully" received, which implies consent and agreement on his part, otherwise he would have rejected the money. Therefore, the act or offense of agreeing is included in the offense of receiving, which was alleged in said count three. And so, if Burton was guilty of agreeing to receive, that offense could have been proved under said count three, and Burton convicted thereof if guilty. Therefore, when by direction of the Court Burton was acquitted on said count three, that acquittal was an acquittal of agreeing to receive said $500, and is good in bar of the indictment for agreeing to receive said $500.

See *United States* vs. *Ball,* 163 U. S. 662, 670, construing said section 1035 Revised Statutes, and *United States* vs. *Nickerson,* 17 How. 204.

As Burton was on said former count three acquitted of *receiving* this $500, and of *agreeing* to receive this $500, this is an acquittal of the charge in counts one, two, six and eight of the present indictment, that Burton *agreed* to receive $2,500 as compensation for services. The $500 was part of this $2,500, and the allegation that Burton agreed to receive this $2,500 is negatived if Burton did not agree to receive this $500. As the acquittal on former count three decided that Burton did not agree to receive this $500, it decided also that he did not agree to receive this $2,500, of which this $500 was a part. Furthermore, any evidence to establish an agreement to receive this $500 might have been admitted in the former case; and the evidence which was introduced in the present case on which Burton was convicted of an agreement to receive this $2,500 was no other or different from the evidence which might have been introduced in the former case to convict Burton of agreeing to receive said $500.

Therefore, acquittal on count three in the former case is

good in bar not only of counts three and seven of the present case, but also of counts one, two, six and eight, which allege that Burton agreed to receive compensation for services.

Obviously, Judge Adams made a mistake on the trial of the former case when he said that because count three was like counts one and two, therefore if there was a conviction on counts one and two there should not be a conviction on count three. What he should have said was, if count three was like counts one and two, there should be a conviction on all three counts. This error of Judge Adams, however, was no other or different from the error of the trial court mentioned in the case of *United States* vs. *Nickerson,* 17 How. 204, where it was erroneously held by the trial judge in the first case that the indictment was so drawn "as to preclude the United States from offering evidence to prove that the defendant knowingly and wilfully swore falsely that the paper produced was the original agreement and that three fourths of the crew were citizens," and so holding, the defendant was acquitted. Such acquittal was held to be a good bar to a subsequent indictment. Nor is it any different from any other error of law committed by a trial court in favor of an accused person resulting in an acquittal. Such an error constitutes no reason for violating the mandate of the Constitution, that no person shall twice be put in jeopardy for the same offense. It was the duty of the prosecution on the trial in the former case to see that Judge Adams did not commit this error, and the prosecution cannot complain now if the defendant pleads this verdict of acquittal in bar of the present indictment.

IV.

A. There was no Evidence to go to the Jury that Burton Made Any Agreement to Receive Compensation for Services to Prevent the Issuance of a Fraud Order. Therefore the Court Erred in Submitting to the Jury the Question whether Burton Made Such Agreement.

B. Whatever the Agreement was Which Burton Made to Receive Compensation from the Rialto Grain and Securities Company for Services, such Agreement was not made in the State of Missouri, and the Defendant was Deprived of His Constitutional Right to be Tried in the State and District Where the Agreement was Made, Contrary to Section 2, Article 3, of the Constitution and of the Sixth Amendment Thereof.

First, the indictment charges an alleged agreement of the defendant with the Rialto Company at St. Louis, Missouri, on November 18, 1902, for a stated compensation for services to be rendered by Burton in the Post Office Department at Washington to prevent the issuance of a fraud order. The first, second, *sixth* and eight counts in the indictment are of this character. The defendant was found guilty on these counts (record, page 33), and the Court rendered judgment on the *sixth* count that the defendant be imprisoned for six months and be fined in the sum of $2,000, and be forever incapable of holding any office of honor, trust or profit under the United States (record, page 35).

Second, the indictment charges that on the 26th of March, 1903, at St. Louis, the defendant received from the Rialto Grain and Securities Company $500 compensation for services rendered by him before the Post Office Department from November 18, 1902, to March 26, 1903, to prevent the issuance of a fraud order against the Rialto Grain and Securities Company. This is the substance of the charge against the defendant in the third and seventh counts of the indictment. The defendant was found guilty on these

counts (record, page 33), and sentenced on the *seventh* count to pay a fine of $500 and to six months' imprisonment, such term of imprisonment to begin and run concurrently with the term of imprisonment imposed by the judgment and sentence pronounced upon the sixth count of the indictment, and by his conviction under the seventh count that he be forever incapable of holding any office of honor, trust or profit under the government of the United States. The fourth and fifth counts of the indictment were *nolled* by the Government before the trial (record, page 19), and the judgment and sentence of the Court (record, page 35), states: The first, second and eighth counts upon which a verdict of guilty was returned appearing to cover the same transaction and offense as is embraced in the *sixth* count, it is ordered that no judgment or sentence be pronounced upon the first, second and eighth counts of the indictment; and it appearing that the third count of the indictment upon which a verdict of guilty was returned embraces and covers the same transaction embraced in the *seventh* count, it is ordered that no judgment or sentence be pronounced upon the third count of the indictment.

We deal under this head with the questions arising on the counts relating to the alleged agreement of the defendant at St. Louis on November 18, 1902, to receive compensation for services to be rendered by the defendant to the Rialto Grain and Securities Company to prevent the issuance of a fraud order. We deal under a separate head with the counts relating to the payment on March 26, 1903, for services alleged to have been rendered between November 18, 1902, and March 26, 1903.

There is no conflict of evidence here to deal with. It is conceded that whatever the defendant did in making any agreement was done in part in the State of Illinois and in part in the District of Columbia, but it is contended by the Government that he was at the time constructively present in Missouri.

The facts are briefly: that the Rialto Company was a corporation of Missouri, with its office in the city of St. Louis. Hugh C. Dennis was its President and Thomas B. Harlan was its local counsel. The President desired to employ the defendant, who at the inception of the matter, on November 17th, 1902, was passing through St. Louis. The defendant was introduced to Dennis and to Harlan, but there was no time to consider the matter, and Harlan took the train for Chicago with Burton to talk it over on the way. The train pulled out of St. Louis and was in Illinois before conversation respecting the employment was begun. Whatever was said by Burton to Harlan or by Harlan to Burton was said on the train or in Chicago. The scope of the employment as to the kind of services to be rendered was stated, a compensation of five hundred dollars per month for a period of at least five months was mentioned, which the defendant expressed himself as willing to receive, and which Harlan approved as reasonable, but nothing was said as to the time when the period of service was to begin or when it was to end. Harlan told Burton that he had no authority to conclude anything, but would take it up with Dennis on his return. The only testimony as to what was said concerning any notification to the defendant of Dennis' conclusion was that of the defendant, viz: "When I parted with him that night he said he had no authority to contract, but he would recommend that I be employed. And if it was decided to employ me that he would come on to Washington for a full conference." (Rec. 234 and 235.)

The defendant went from Chicago to Washington, and Harlan returned to St. Louis. Upon the day of his return to St. Louis, November 18th, and from St. Louis Harlan sent a telegram addressed to the defendant at Washington. This is not in the record. On the same day he addressed a

letter to defendant at Washington, which, so far as it relates to the question under consideration, is as follows:

> "Hon. J. R. Burton, Senate Chamber, Washington, D. C. My Dear Sir: Mr. Kastor and I arrived safely and on time this a. m. I found myself confronted with a number of engagements, which, together with Major Dennis' condition prevented me from wiring you as early an hour as I expected. However, I hope you received my message to the effect that this Company accepts your terms to act as counsel at a salary of $500.00 per month, said service to begin immediately; that is of this date, November 18th, 1902."

The letter also requested the defendant to call at the Department if convenient to inquire if the Government intended to prosecute Dennis. (Rec. pp. 112 and 113.)

The defendant received the letter on November 20th, went to the Department, made the inquiry suggested and also inquired as to some other matters. He then wrote to Harlan, advising him of the things he had learned, and concluded, "In return, if agreeable, you may make remittance for my first month's pay." (Rec. p. 114.)

Harlan replied on November 22nd, "I enclose the Company's check for $500.00 as per agreement. This check should have been sent in my former communication, but I neglected to do so." (Rec. p. 115.)

This covers everything bearing on the question of the place where the defendant did what is charged against him as an offense.

We are dealing with criminal and not with civil law, with the punishment of offenses and not with the enforcement of contracts, and we are dealing under the solemn sanctions of Constitutional provisions intended for the benefit of persons accused of crime.

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the state and district wherein the crime shall have been comitted. (Sixth Amendment.)

It is needless to comment upon this, the fundamental law of procedure in the case. The history, the purpose and the meaning of this provision which guarantees an absolute right to the defendant are well known. No mere legal fiction can prevent its application. The place of the commission of an offense is and must be the place of trial for that offense.

Charge of the Court as to the Alleged Agreement.

The following is the charge of the Court in relation to the alleged agreement (record, page 259):

> "The questions which relate exclusively to the counts charging the defendant with having agreed with the Rialto Grain and Securities Company at St. Louis, Missouri, to receive from that company a stated compensation for services to be rendered by him to that company in relation to the proceeding before named, are these:
>
> (1) Did he make such an agreement? That he made an agreement of some character to act as counsel for that company for a stated compensation, is conceded. The real question is, whether that agreement included, among other matters in relation to which he was to serve the company, the proceeding in the Post Office Department before named. Upon that question the evidence is conflicting, and it is your duty to weigh the evidence and determine the truth. If among other things it was intended by the defendant and the Rialto Grain and Securities Company in making the agreement that he would in part consideration for the compensation he was to receive, appear as agent or attorney of such Company before the Post Office Department or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing or obtaining action on their part favorable to such Company in said proceeding, whether by way of stopping the investigation or ultimately preventing the is-

suance of a fraud order; then I charge you that the agreement of the defendant was violative of the statute; otherwise it was not. The offense prescribed in the statute consists in the agreement to receive compensation for the rendition of such services. The mere agreement to render the services is not an offense. It is the agreement to receive compensation for the rendering of them which constitutes the offense. It should be carefully observed that the actual rendition of services is not a necessary element of this offense. The offense is complete and the defendant's guilt is established if the evidence shows that he made an agreement to render such services for compensation.

(2) If there was an agreement on the part of the defendant to receive compensation for services to be rendered by him in such a fraud order proceeding, was the agreement made within the jurisdiction of this Court—in other words, was it made in Saint Louis, Missouri? Upon this question I charge you that if such an agreement was negotiated or tentatively effected at some other place, but with the understanding on the part of the defendant that it should be communicated to the Rialto Grain and Securities Company at Saint Louis, Missouri, to be there accepted or ratified by that company before it should become effective, and if thereafter, in pursuance of such understanding, the proposed or tentative agreement was communicated to the Rialto Grain and Securities Company at Saint Louis, Missouri, and was there accepted and ratified by that company without any change in the terms, then the agreement was made at Saint Louis, Missouri, and within the jurisdiction of this Court. The fact that the defendant was notified of such acceptance or ratification by a telegram or letter sent to him at Washington would not alter this result, if the circumstances under which the negotiations were had, and the tentative agreement was made, were such that it can be reasonably inferred that he contemplated and assented to notice of the acceptance of his proposition being communicated to him through that medium."

This Charge of the Court is Fundamentally Erroneous in the Following Particulars:

First. There was no evidence whatever to go to the jury that Burton made any agreement on November 18, 1902, or at any other time, at St. Louis or anywhere else, to render services to prevent the issuance of a fraud order. All negotiations looking toward Burton's employment by the Rialto Company were had between Harlan, its representative, and Burton, on the train in Illinois on the 17th day of November, 1902; and no part of these negotiations, then or afterwards, were had in the State of Missouri. Harlan and Burton were the only parties to that negotiation on the train, and they were the only witnesses called to prove what took place between them on the train. Both Harlan and Burton testify positively and unequivocally that there was no agreement made by Burton or any willingness expressed by Burton to render any services before the Post Office Department to prevent the issuance of a fraud order. It is not necessary here to go over this evidence at length to prove the correctness of this statement, that having been done in other parts of this argument, and the correctness of this statement appears from the evidence set forth in the record. Furthermore, Harlan was the Government's own witness. So far, therefore, as the negotiations on the train between Harlan and Burton were concerned, no agreement that they made or contemplated covered any services to prevent the issuance of a fraud order.

Presumbably Harlan had some conversation with Dennis as to what took place between Burton and himself on the train. Just what Harlan said to Dennis does not appear. It is a remarkable feature of the Government's prosecution of this case that it offered no evidence whatever by Harlan or anyone else as to what conversation was had between Harlan and Dennis when Harlan returned to St. Louis after having had his conference with Burton on the train. The

record is silent as to what Harlan told Dennis that Burton was or was not to do.

The next thing that occurred was that Harlan wrote to Burton the letter dated November 18, 1902. (record, page 112.)

The trial Court, therefore, having before it the evidence of Harlan and the evidence of Burton, and this letter of November 18, 1902, and having nothing else before it relating to the making of the agreement or the terms of the agreement, made the charge to the jury above quoted, leaving the jury at liberty to find the defendant guilty of having made an agreement to prevent the issuance of a fraud order, although both Harlan and Burton, the only witnesses as to what the agreement was, positively and unequivocally testified that no such agreement was made, and although the letter of November 18, 1902, contains not a shadow of evidence that any such agreement was made. Our proposition, therefore, is that this charge to the jury is fundamentally erroneous, because there was no evidence whatever that any agreement to prevent the issuance of a fraud order was ever made by Burton.

Furthermore, the Court erroneously stated to the jury that *the evidence as to this agreement was conflicting*, when it was not, but on the contrary unequivocal that no such agreement was made or contemplated. The Court also said to the jury as follows:

> "The mere agreement to render the service is not an offense. It is the agreement to receive compensation for the rendering of them which constitutes the offense. It should be carefully observed that the actual rendition of services is not a necessary element of this offense. The evidence is complete and the defendant's guilt is established if the evidence shows he made an agreement to render such services for compensation."

Therefore, under this instruction, the defendant, might, if he made such an agreement on the 18th day of November, 1902, have been indicted on the same day or the next day,

and convicted, although he rendered no service pursuant to such agreement. Accordingly the Court permitted the jury to find Burton guilty on the evidence of Harlan and Burton and the letter of November 18th above referred to. As to this fatal defect of want of evidence as to the alleged agreement to render services to prevent the issuance of a fraud order, the Court stated to the jury as follows (record, pages 260-261):

> "When a controversy arises as to what was the intention or purpose of the parties entering into an agreement, the terms of which are in question, one of the safest and best indications of the true intent or purpose of the agreement is the practical interpretation given to it by the parties while they are engaged in its performance, and before any controversy arose concerning it. Thus, evidence of the actual conduct and acts of the parties relating to the subject matter of that agreement and occurring while they were engaged in executing it, is at times more persuasive and safer evidence of the actual character of the agreement than is testimony coming from the parties after a controversy about it shall have arisen, and at a time when their recollection may be dimmed by the lapse of time, or when the accuracy of their testimony may be otherwise affected. This rule is of especial application in the instance of agreements made in violation of the law where there would be a motive to escape the legal or moral consequences of making such an agreement."

The objections to this charge to the jury are various. *First*, there was here no ground for the application of any such rule, because the only two witnesses as to this contract agree in stating that it did not contemplate or provide for the rendition of services by Burton of a prohibited character before the Department. Therefore there is no ambiguity to be cleared up by any construction put upon the agreement by the contemporaneous acts of the parties.

The *second* objection to this charge of the Court is that there is no evidence to support it. There was no practical interpretation of this contract by Burton rendering any ser-

vice to prevent the issuance of a fraud order, and there was nothing to go to the jury permitting them to infer that he had rendered such services. When the Court therefore said,

> "Evidence of the actual conduct and acts of the parties relating to the subject matter of that agreement and occurring while they were engaged in executing it, is at times more persuasive and safer evidence of the actual character of the agreement than is testimony coming from the parties after a controversy about it shall have arisen,"

it implied that there was in the actual conduct and acts of Burton evidence from which the jury would be justified in inferring that he had made an agreement on the train with Harlan to render prohibited services. The Court gave to this erroneous charge greater fatality by adding that "this rule is of especial application in the instance of agreements made in violation of the law where there would be a motive to escape the legal or moral consquences of making such an agreement."

The evidence and the undisputed evidence of Cochran, the only Post Office official with whom Burton had any conference claimed by the Government to relate to the issuance of a fraud order, is that Burton made no representations with respect to the Houts and Evans complaints, did not discuss any such thing as the issuance of a fraud order, and never did discuss with him the issuance of a fraud order, and never requested that no fraud order be issued. Cochran testified to the same thing as to each and all of the interviews which he had with Burton (record, pages 169-172).

We do not here go into this subject at length, because it is treated in full under Point V of this brief and elsewhere, but we state here briefly that the first visit of Burton to Cochran was concerning the indictment against Dennis; that was the sole purpose of the visit, and that visit was made after Burton received Harlan's letter dated November 18, 1902, (record, page 112), relating solely to Dennis, and did

it, unless A notified B before B mailed an acceptance that he, A, had withdrawn his offer. The rule exists in order to regulate the rights of the acceptor. This is the reason and necessity of the rule, and the rule is limited by its necessity. It does not require the Court to create a fiction such as the trial Court in the present case created, that Burton was in St. Louis, when in fact he was not there, and was in St. Louis, not by reason of his own act, but by reason of the act of another party in mailing the letter of November 18th.

Second: However the question may be decided in civil cases under the law of contracts, we submit that in the criminal law of the United States under the provisions of article 3, section 2 of the Constitution, and the sixth amendment, there is no room for any such view as was taken by the Court below in holding that Burton made a contract in St. Louis the moment that Harlan, by direction of Dennis, mailed the letter of November 18th at St. Louis; and the Court erred in holding that under these circumstances the mailing of such letter by Harlan to Burton completed the offense in St. Louis the very moment it was mailed, and that Burton, although actually absent, was constructively present in St. Louis and gave the Court jurisdiction to try him at that place. Observe that under this erroneous view this offense of Burton is *ambulatory*. If Harlan and Dennis had been in Canada and mailed the letter there, under the view of the Court below Burton would have committed no offense, because the letter would have been mailed in Canada and the offense committed there, if anywhere, and that would have been outside the jurisdiction of the United States. And if Harlan and Dennis had been in California and had mailed the letter of November 18th there, the offense would have been committed in California, and the United States Court in California would have had the same jurisdiction over it that the Court asserted in favor of the jurisdiction in St. Louis, and Burton, under that view, could have been dragged to San Francisco to defend himself, as in this instance

he was twice dragged to St. Louis to make his defense, notwithstanding the provisions of the Constitution mentioned, guaranteeing to him the right of trial by a fair and impartial jury in the *state and district* where the offense was committed.

The only sound view is that a person shall be tried where he committed the offense, and if Burton made an agreement in violation of this statute, he was either in the state of Illinois or in the District of Columbia when he made such agreement; he was not in the state of Missouri.

The Jurisdiction of the United States Court in Missouri to try Burton on the Counts of this Indictment Alleging the Making of an Agreement Cannot be Sustained Under Section 731 of the Revised Statutes, on the Theory that Burton's Offense was Committed Partly in Illinois and Partly in Missouri, or Partly in Washington and Partly in Missouri.

Said Section 731 of the Revised Statutes is as follows:

> "When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district in the same manner as if it had been actually and wholly committed therein."

An indictment in the United States Courts must set forth the place where the offense was committed. This is elementary law, and made more indispensable, if possible, by the provisions of the Constitution that a defendant is entitled to be tried in the place where the offense was committed. If the Government claimed that this offense was committed partly in Illinois and partly in Missouri, then an indictment which alleges that the offense was committed *wholly* in Missouri does not state where the offense was committed. The indictment in the present case alleges that the "agreement was made at St. Louis." It alleges (page 12) that

Burton on the 18th of November, 1902, "at St. Louis did agree," etc. There is no allegation of any agreement made in Illinois or of any act whatsoever done in Illinois, nor is there an allegation of any agreement made in the District of Columbia. The plain meaning of the allegation on the face of it is that Burton was in St. Louis in person and made, on the 18th of November, the alleged criminal agreement in that place. When the Government came to the trial of this case it was shown that no agreement was made by Burton in St. Louis of any character, and that the acts which the Government claimed Burton committed in making the agreement, were performed wholly outside of St. Louis, either in Illinois or in Washington. Therefore we say that the Government could not sustain its case on the theory that the making of the agreement was done at least partly in Missouri, and call to its aid section 731 of the Revised Statutes.

As to the Doctrine of Constructive Presence. Burr's Case.

The doctrine of *imputed, fictitious or constructive presence* in the alleged locality of the crime by the mere mailing of the letter of November 18th, although the accused was *in fact absent,* would, if applied in this case, be in direct conflict with the Constitution (Art. III, Sec. 1), and the Sixth Amendment securing to the defendant "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The ruling of the Court below calls upon this Court to decide whether the odious doctrine of *constructive criminality* has any application to this case; whether crime has a locality and a person accused has a right to be tried in the place where the acts constituting the alleged crime were committed; whether the offense charged against the defendant is *ambulatory* and is committed in Chicago, London, San

Francisco or St. Louis, depending upon the accident where a particular letter may be mailed, and whether it can be committed in a distant jurisdiction through the fiction of an *imputed, fictitious and constructive presence.*

Why did the Constitution erect the bulwark of personal liberty provided for in the Constitution and in the Sixth Amendment that every person accused of crime shall enjoy the right of *trial* by a jury *in the State and district where the crime was committed?* It was because it was deemed essential to justice that no man ought to be triable or tried except in the place where the acts constituting the crime were actually committed; where the character of the prosecutor and of the accused, as well as of the witnesses, are known, and where the attendance of witnesses for his defense can be enforced. In a country of such vast geographical extent as ours, this established principle of the law of England as to the locality of crime and of criminal jurisdiction was considered of such prime and fundamental importance to the liberty of the citizen that it ought to be safeguarded by the Constitution itself, and the people of this country were not satisfied until this great bulwark of justice and of individual right and liberty was further secured by the specific provisions of the Sixth Amendment to the Constitution.

Section 731, Rev. St., *supra,* is a transcript of the Act of 7 Geo., IV, c. 64, sec. 12, which provides that where an offense is "begun in one county and completed in another the offender may be tried in any of such counties, as for example, a wound in one county and death in another."

Stephen, Digest Crim. Procedure, p. 47 and note, citing R. vs. Jones, 1 Russell on Crimes, p. 8.

The statute on its face is limited to cases "where some of the acts material and essential to the crime and requisite to its consummation occur in one county and some in the other in which case the accused is indictable in either."

12 Cycl. Law & Proc., pp. 239, 240.

underwent the most exhaustive examination to which it was ever subjected, by Chief Justice Marshall in the *United States vs. Aaron Burr.* It was the turning point of that famous case. It was discussed at the bar for days by lawyers eminent for ability and learning, as will be seen by Robertson's shorthand report of the trial. Marshall's opinion in that case has, so far as we know, never been questioned. It is given in full in *Robertson's Report;* also in the *Appendix* to 4 Cranch's Reports, and also in *Marshall's Complete Constitutional Decisions* (by John F. Dillon, pp. 82-165).

The indictment charged Burr with treason, alleging *as the overt act that he levied war on Blennerhassett's Island in the State of Virginia.* The indictment was found and the trial took place in the United States Circuit Court for Virginia.

At the time of the assemblage of men on Blennerhassett's Island, Burr was two hundred miles distant *in another Federal district and State.* It was held that the indictment "could not be supported by proof that war was levied at that place (Blennerhassett's Island) by other persons, in the *absence* of the prisoner, *even admitting those persons to be connected with him in one common treasonable conspiracy.*"

Chief Justice Marshall in his great opinion says:

> "*The place* in which a crime is committed is essential to an indictment, were it only to show the jurisdiction of the Court. It is also essential for the purpose of enabling the prisoner to make his defense. That at common law an indictment would have been defective which did not mention the place in which the crime was committed, can scarcely be doubted. For this it is sufficient to refer to Hawkins, V 2, c. 25, sec. 84, and c. 23, sec. 91. This necessity is rendered the stronger by the constitutional provision that the offender 'shall be tried in the State and district wherein the crime shall have been committed,' and by the Act of Congress which requires that twelve petty jurors, at

least, shall be summoned from the county where the offense was committed.

"A description of the particular manner in which the war was levied seems also essential, to enable the accused to make his defense. The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him. In common justice, the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation, and the circumstances which will be adduced against him. * * *

"That clause in the Constitution, too, which says that in all criminal prosecutions the accused shall enjoy the right 'to be informed of the nature and cause of the accusation,' is considered as having a direct bearing on this point. It secures to him such information as will enable him to prepare for his defense. It seems, then, to be perfectly clear that it would not be sufficient for an indictment to allege generally that the accused had levied war against the United States. The charge must be more particularly specified, by laying what is termed an overt act of levying war. The law relative to an appeal, as cited from Stamford, is strongly corroborative of this opinion. *If it be necessary to specify the charge in the indictment, it would seem to follow, irresistibly, that the charge must be proved as laid.*

"All the authorities which require an overt act require also that this overt act should be proved. The decision in Vaughan's case is particularly in point. *Might it be otherwise, the charge of an overt act would be a mischief instead of an advantage to the accused. It would lead him from the true cause and nature of the accusation, instead of informing him respecting it.*

"But it is contended on the part of the prosecution that, although the accused had never been with the party which assembled at Blennerhassett's Island, and was at the time at a great distance, and in a different State, he was yet legally present, and, therefore, may properly be charged in the indictment as being present in fact. It is, therefore, necessary to inquire whether

in this case the doctrine of constructive presence can apply.

"If such evidence would support such an indictment, by *the fiction that he was legally present, though really absent,* all would ask, to what purpose are those provisions in the Constitution which direct the place of trial and ordain that the accused shall be informed of the nature and cause of the accusation?" * * *

And because Burr was actually absent and could not under the circumstances be considered as constructively present on Blennerhassett's Island, although he procured the assemblage at that place, the prosecution failed for want of jurisdiction in the Circuit Court for Virgiana, and Burr was acquitted.

The decision in Palliser vs. United States, 136 U. S. 257, is not in conflict with the foregoing views. The offense charged was an offer of money to a Postmaster to induce him to sell postage stamps on credit. The Postmaster was in Connecticut, the defendant in New York. The offer was made in a letter mailed by the defendant in New York to the Postmaster in Connecticut. The Postal Department was clearly the innocent agent of the defendant in conveying the offer to the Postmaster. The offer to the Postmaster, which was the crime, could be made to him only where he was.

And Horner vs. United States, 143 U. S., 212, proceeds upon the principle of the Palliser case. The offense charged was causing a lottery circular to be delivered in Chicago through the agency of the Post Office. The offense was held to consist in the delivery of the circular and so was held to be committed at the place of delivery, and not at the place of mailing.

The nature of the offense, that which constitutes its turpitude, must be considered in determining the place of its commission.

If the offense were simply discharging fire arms, even though a man aimed across a state boundary, the venue

would be in the state wherein he stood. Where a statute makes it an offense to send letters designed to extort money, the offense of sending is triable only in the county from which the letter is sent. Sands vs. State, 26 Tex. App., 580.

In United State vs. Fowkes, 53 Fed. Rep., 13, the defendant had been indicted with others for exacting from a shipper a less compensation for transportation of freight than was prescribed by statute. The shipment was from St. Louis to New York. The defendant was the agent at Philadelphia of one of the connecting carriers making up the line. He signed the "line voucher" on behalf of his company. The Court said:

> "The appellee was simply the freight claim agent of the Philadelphia & Reading Railroad Company. As such agent, all that it was competent for him to do in or about the transaction averred to be criminal was the signing of a 'line voucher,' and the evidence was to the effect that no voucher which he had any authority to sign could have operated as an allowance of a claim for rebate from the schedule rate. If it be assumed, however, that he did sign an instrument which permitted an unlawful act, yet it is beyond question that whatever he did was done in Pennsylvania, and that his offense, if any, was both begun and completed in that state; and that he did not elsewhere, in any manner, charge, demand, collect, or receive, or cause or permit to be charged, demanded, collected, or received, from any person whatever, an unlawful compensation for the carriage or shipment of property, as in the indictment is alleged. This case differs materially, as to the facts affecting the point under consideration, from those cited in argument. In re Palliser, 136 U. S., 257, 10 Sup. Ct. Rep., 1034, was a case in which the offense charged was an offer of money, or a tender of a contract for the payment of money, contained in a letter mailed in New York, and addressed to a postmaster in Connecticut, to induce him to violate his official duty, and it was held that the offense continued to

be committed in Connecticut. The letter, it will be observed, was mailed directly to, and was received by, the postmaster in Connecticut; and the only doubt intimated by the Supreme Court was as to whether the offense was at all committed before the unlawful proposal became known to the person to whom it was addressed. Horner vs. U. S., 143 U. S., 207, 12 Sup. Ct. Rep., 407, was decided under a statute making it an offense to cause lottery circulars to be delivered by mail. The delivery occurred in Illinois, and the offense was, therefore held (citing In re Palliser) to be triable there. It is necessary only to compare the facts of these cases with that now before this Court in order to perceive the differences which distinguish them from it. In the present case, the utmost that, under the evidence, can be attributed to the appellee, is that he signed at Philadelphia a paper which was not addressed or delivered to the person whom it is said to have unlawfully favored, but in pursuance of which, another person did, or was authorized to do, a wholly independent and distinct thing, namely, to pay a sum of money, and at another place."

The offense charged in this case is *sui generis.* A Senator is prohibited from agreeing to receive compensation for certain services, but nobody is prohibited from agreeing to give him that compensation.

The offense defined by section 1781 R. S. of U. S. differs in this respect from that charged in this case. It prohibits a member of Congress from receiving or agreeing to receive any valuable consideration for procuring a contract or office for any person, and it also prohibits any person from giving or agreeing to give any Congressman any consideration of value on such account.

In U. S. vs. Dietrich et al., 126 Fed. Rep., 664, Senator Dietrich and one Fisher were jointly indicted as for a conspiracy under this statute, the charge being that they had conspired to violate this statute by agreeing, Dietrich to receive and Fisher to pay $1300.00 in consideration that Diet-

rich would procure the office of postmaster at Hastings, Neb., for Fisher.

It was held that the offense defined by the statute was not a conspiracy, and that while both parties to such a transaction were guilty, each was responsible solely for his own act. The Court said:

> "Unquestionably, the agreement or transaction described consists of two distinct and several acts by separate persons. In every executory agreement the promises therein reciprocally given and received are severally the acts of the parties making them, and not of those to whom they are made. This indictment fully recognizes this when it attributes to Dietrich the act of agreeing to receive the bribe named, and attributes to Fisher the act of agreeing to give it. No effort is made to charge either with the promise of the other. In the very nature of things the two acts are several, not joint. The statute is in terms leveled against the several acts of the intended bribe taker and the intended bribe giver, and makes each a distinct and separate offense. While parts of one transaction, the two acts constitute several offenses, for which those by whom they are committed must respond severally, not jointly."

Although under 1781 both parties to the transaction are guilty, yet each is guilty and is responsible only as to his own act. For the stronger reason then in this case, where only one party to the transaction can be guilty, should he be held responsible only for his own act.

Each party to an agreement in truth acts where he is at the time, and if his act of entering into that agreement is a distinct offense, the place of the offense is where he was when he entered into the agreement, and not where the other party was when that other party entered into the agreement, and especially so if in this last act there was no offense by anybody.

If the offense was committed in St. Louis, then something was done in St. Louis by defendant personally or

through an agent, which constituted the offense. The thing done was, so the Court submitted to the jury, the ratification by Dennis of an agreement tentatively made in Illinois by Harlan with Burton. Up to this time there was no offense. But Burton was not present at this act of ratification and he had no agent there. The act was not his and was not done in his behalf. It was the act of Dennis as President of the Rialto Company and done for that Company. And this act of Dennis, consciously, voluntarily and independently done, and not done for Burton, was held to complete the offense by Burton, or rather to make an offense by him when none existed before.

We are not dealing with what Dennis did or with what he intended. And so it is not the place of the contract, but the place of the commission of the offense which determines the jurisdiction in which the trial for the offense must be had. And as Burton acted for himself throughout, as no one was empowered by him to enter into any agreement for him, the act of Dennis in entering into the agreement cannot be taken as the act of Burton done by Dennis as his agent.

The suggestion that Harlan was in any sense the agent of the defendant, and that the defendant acted through him in Missouri, is not tenable. Harlan was the agent of Dennis as President of the Rialto Company, sent out by him and acting for him from beginning to end. The case would not be different if Dennis himself had gone on the train and negotiated with Burton. And had this been so, and Dennis was for any reason unwilling to conclude at that time, and so took the matter under consideration, saying he would advise Burton of his determination, could it be said that while pondering the matter he was the agent of Burton and thinking for him? And when he reached a conclusion and sent notification of that conclusion to Burton by letter or telegram, was he acting as Burton's agent? If so, then

if Dennis had concluded that he would not accept Burton's terms, Burton would not be guilty, while, if he concluded to accept them, Burton would be guilty. And the place of the offense would be where Dennis reached his conclusion as to what he would do, for then the agreement would be consummated. So Burton's guilt and the place of the offense would be determinable by the mental operations of Dennis, and not by anything done by Dennis under Burton's direction and in obedience to his authorization. And in such case, no notice to Burton would be necessary, for the agreement was complete as to both when Dennis made up his mind as to what he himself would do.

The agreement between Burton and the Rialto Grain and Securities Company was not complete on the 18th of November when Harlan's letter was mailed. That letter varied the terms of the negotiation on the train in two respects: *First*, it fixed the date at which the contract should commence as of November 18, 1902. No date had been agreed upon before, and this was a new term introduced into the contract for the first time by that letter. *Second*, but still more important is this: Harlan and Burton's arrangement provided that the contract should be a monthly employment for not less than five months, Harlan assuring Burton that it would not terminate even then; whereas this letter of November 18th makes no such provision, but says: "Accept your terms to act as counsel at a salary of $500 per month, said service to begin immediately, that is, of this date November 18, 1902," containing therefore no stipulation in Burton's favor that his employment should at least last for the period of five months at least. This Court has held that where there is any such change as this, there is no contract unless and until the parties agree to such cange.

Eliason vs. Henshaw, 4 Wheaton 225.

Until Burton received that letter of November 18th, he had done nothing more than express his willingness to en-

neither is bound. * * * A proposal to accept, or acceptance, upon terms varying from those offered, is a rejection of the offer."

National Bank vs. Hall, 101 U. S., 43.

See also, Minn. and St. L. Ry. Co. vs. Rolling Mills Co., 119 U. S., 151.

Chitty in his work on Contracts, 11 Am. Ed. p. 15 note f, says:

"The agreement is not complete until there is upon the face of the correspondence a clear accession on both sides to one and the same set of terms."

When labor or service is involved, time is as essential an element as quality or character.

Christian Co. vs. Bienville Co., 106 Ala. 124.

The letter of the Rialto Company of November 18th, 1902, being then in effect an original proposal, there was no contract until this proposal was accepted by the defendant, and this he did by his letter of November 20th, written and mailed at Washington, and Washington was, therefore, the place where the contract was made.

The proposal of the Company cannot be aided by parol. It does not assume that terms had been arranged between Harlan and Burton, and then simply accept those terms. On the contrary, it states what those terms are, and they constitute, if accepted, a contract of employment by the month. Tennessee Co. vs. Pierce, 81 Fed. Rep. 814. A written agreement thus complete cannot be supplemented by parol.

Seitz vs. Brewers' etc. Co., 141 U. S. 510, involved a contract of sale of a refrigerating machine. The contract was in writing, described the type of the machine, the mode of delivery, price and terms of payment. It was silent as to the efficiency of the machine, as to which it was claimed a verbal guaranty had been made. The Court said:

"Undoubtedly the existence of a separate oral agree-

ment as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies, that is, it must be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing. Greenl. Ev. sec. 275.

There is no pretense here of any fraud, accident, or mistake. The written contract was in all respects unambiguous and definite. The machine which the company sold and which Seitz bought was a No. 2 size refrigerating machine as constructed by the company, and such was the machine which was delivered, put up, and operated in the brewery. A warranty or guaranty that the machine should reduce the temperature of the brewery to 40 degrees Fahrenheit, while in itself collateral to the sale, which would be complete without it, would be part of the description and essential to the identity of the thing sold; and to admit proof of such an engagement by parol would be to add another term to the written contract, contrary to the settled and salutary rule upon that subject.

Whether the written contract fully expressed the terms of the agreement was a question for the Court, and since it was in this instance complete and perfect on its face, without ambiguity, and embracing the whole subject matter, it obviously could not be determined to be less comprehensive than it was. And this conclusion is unaffected by the fact that it did not allude to the capacity of the particular machine. To hold

that mere silence opened the door to parol evidence in that regard would be to beg the whole question."

However then we consider the transaction in question, the result is the same. If we are to treat it as a contract, it was concluded at Washington, and so if the place of the contract is the place of the offense, the defendant was entitled to be tried at Washington. But as the offense consists solely in what the defendant did in the matter, and not in what was done by the other party to it, his act, if an offense, is triable only where it was committed.

Every reason underlying the Constitutional provision invoked by us, requires that this question of place of the offense shall be determined upon substantial grounds of fact, and not upon legal fictions.

V.

There was no Evidence to Sustain any Count of the Indictment.

Three of the counts charge the defendant with an agreement to receive compensation for services to be rendered in a proceeding pending in the Postal Department against the Rialto Grain and Securities Company, and two with receiving compensation for services rendered by him in such a proceeding.

In the discussion of this branch of the case, we shall take as typical the counts on which the Court pronounced sentence, the sixth and the seventh.

The sixth count charges these several facts:

1. That at the time involved, the defendant was a Senator of the United States from the State of Kansas.

2. That on the 18th day of November, 1902, the Rialto Grain and Securities Company was a corporation of the State of Missouri, and was pretending to carry on the business of a dealer and broker in grain and securities.

3. That there was then pending before the Postal Department of the United States a proceeding in which the United States was indirectly interested.

4. This proceeding was to determine whether the Rialto Company was engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, and whether the Postmaster General should issue a fraud order against the Company.

5. That the defendant then knew this proceeding to be then pending.

6. That the defendant agreed with the Rialto Company to receive from it twenty-five hundred dollars.

7. That this was to be received by him as compensation for services to be rendered by him to the Company in the before mentioned proceeding while it was pending before the Department.

8. That the services to be rendered consisted of his appearing before the Post Office Department, the Postmaster General, the Chief Post Office Inspector, the Assistant Attorney General for the Post Office Department, and other officers of the Department, as an agent and attorney of the Company, and obtaining information for it concerning the proceeding, and by the influence of his presence and of his office as Senator, and by statements, representations and persuasion inducing the Postmaster General to believe that that Company was not conducting such a scheme as that stated above, and so end the investigation and not issue a fraud order.

The first and second of the enumerated facts were conceded or established, except in so far as the indictment charges the business of the Rialto Company to be a pretended one. This, the Court held to be immaterial.

The third has been considered in its legal aspect, viz: whether what was shown to have been done in and by the Post Office Department constituted a proceeding within the

meaning of the law, and we consider it further to determine whether, as a matter of actual fact, anything was pending.

Two complaints had been sent in, one by Mrs. Houts, and one by Mrs. Evans, both of Albany, New York. This, and the immediately succeeding letter of Fravel, which made no complaint and only enclosed some literature, had been sent out to St. Louis to the Inspector in charge, turned over to the man in the field, investigated by him and reported upon by him as unwarranted, before the 18th day of November, and before Burton had met anybody connected with the Rialto Company, and there was never after anything done by anybody respecting these letters. The investigation as to these letters, if not dead, was dormant, and to this day has not come to an awakening. The testimony of Price, the man in the field, is explicit that he had examined the matter and made his report that the charges were unfounded. His Inspector in charge testifies that this report was made to him. The Rialto Company knew of the investigation, was informed of the result, and believed it to be at an end, and acted accordingly. As shown by evidence offered by us, but rejected by the Court, an investigation of the Rialto Company was begun July 27th, 1903, and continued for a month. It had no relation to the Houts and Evans complaints, but covered the period from January 1st to July 31st, 1903. The report of the field inspectors Price and Piatt may be found in the record pp. 216 to 225. They set forth on p. 217 the original organization of the Company and its reorganization on December 31st, 1902, which later organization continued until August 19th, 1903. They say "the period covered by this latter organization is the one also covered by the complaints and by our investigation.' And on page 219: "As stated before, our investigation covered the period from January 1st to July 31st, 1903. This was principally due to the fact that the officials of the original organization had been dismissed

and the books closed, because few complaints existed prior to the beginning of this period."

It seems to be the usage of the Department when a complaint comes in against a person to "jacket" that complaint, that is, put it in a wrapper and give it a number, and thereafter if any other complaints come in, however unrelated to the first, to assign them to that same jacket, and in that way it is contended a proceeding is pending continuously from the receipt of the first complaint.

But we submit that complaints made or letters sent in after November 18th, 1902, do not show a proceeding pending on that day. So that we are to look only to the complaints made before November 18th. These had been actually disposed of on November 14th, and the disposition then made of them stands to this day. If nothing further had transpired respecting the Rialto Company in the Department than this, if only these complaints had been made, and after being so disposed of, the defendant had made inquiry of the Chief Inspector whether there were any complaints, and had been answered that these two had been made and sent to the field, no one would assume to say that the defendant was employed to render service in the Department in a proceeding there pending against the Rialto Company. Nobody would then have questioned, under the testimony in this case, that the employment of the defendant was with reference to the indictment of Dennis and the Securities business of the Rialto Company. The officers of that Company knew, or at least believed, that this "proceeding" was dead. They said nothing to Burton respecting it, and so far as concerned the agreement made with him, it was actually non-existent.

The "proceeding," such as it was, never had any reference to the issuance of a fraud order. All the evidence in the case shows this. Section 44 of the Postal Regulations provides, among the duties of inspectors, that "alleged

violations of law are to be investigated and reported upon by them, and they will, when necessary, aid in the prosecution of all criminal offenses."

Section 1617 of the Postal Laws and Regulations is identical with section 5480 of the Revised Statutes, which has nothing to do with the issuance of fraud orders, and simply provides for the punishment of persons who use the mails in aid of certain defined schemes to defraud.

When the Houts and Evans complaints came in, they were sent out for investigation to determine whether or not there had been a violation of section 1617. They were sent in a jacket or wrapper, which contained this endorsement:

"Subject, alleged fraudulent scheme.
Complaint, Bella Evans, Mrs. K. C. Houts.
Address, 856 3d St., Albany, N. Y.
Date, Oct. 30, '02.
Vio. of Sec. 1617.
By Rialto Grain & Security Co.
Address, St. Louis, Mo.

Washington, D. C., Nov. 7, '02.

Respectfully referred to Post Office Inspector in charge at St. Louis for investigation and report.

W. E. COCHRAN,
Chief Inspector."

There was no proceeding with reference to the issuance of a fraud order. The complaints of Houts and Evans coming in there were sent to Dice with instructions simply, "investigate and report whether these Rialto people have violated section 1617." The investigation might show them to be innocent of all offense. It might give cause to believe that they had violated section 1617, which would be proper occasion for calling the matter to the attention of the prosecuting authorities. It might give cause to believe that a scheme for obtaining money through the mails by fraudulent pretenses was being conducted, in which case the matter would come before the Assistant Attorney General for the Post Office Department, and not until then could it be said that a fraud order proceeding was pending.

As to the fifth fact charged in the indictment, viz: that the defendant knew on November 18th that a fraud order proceeding was pending, there is not only no evidence to sustain the charge, but on the other hand, the evidence is conclusive that he knew nothing of anything existing in the Department until November 20th.

Harlan and Burton are the only witnesses to what occurred on the train. The evidence of both is clear to the effect that Burton was not informed of the existence of any complaints. And Harlan believed there were none. Only two complaints had, up to this time, been made against the Company, and these, he had been informed and believed, had been reported upon as unfounded. From no other source could Burton then have ascertained whether there were complaints or not. He testifies that he was assured there was no trouble with the Department, and would be none. When he got Harlan's letter on the 20th, he went to Cochran's office and inquired concerning the Dennis prosecution, growing out of the Brooks business, and then, naturally and properly enough, inquired whether there were any complaints against the new Company, the Rialto. Cochran did not know, but inquired of his clerk and found two names endorsed on a jacket, but even then did not know what the complaints were. He gave Burton the meager information he had, and Burton at once communicated it to Harlan by letter of that date. Reading the letter of November 18th from Harlan to Burton, that of November 20th from Burton to Harlan and Harlan's reply of November 22nd, the conclusion is irresistible that Burton learned of the matter first on the 20th. Harlan's first letter has not one word about any troubles of the Rialto Company in it. Burton's letter shows that he regards it as something unknown to Harlan, for he gives him such information as he has, and wants to know what there is in the complaints. Harlan assures him that the complaints referred to have

been investigated by the Inspector, "and he found the actions of our Company to be all right, and we are informed, made a report in favor of our Company relative to the same." It is obvious from the correspondence that this was a matter of which Burton then heard for the first time, and for the last time. His mind was set at rest concerning it by Harlan's letter, for it is not again suggested in correspondence or conversation.

Not only was Burton ignorant of the Houts and Evans charges as such, on the 18th of November, but he was ignorant of the pendency of any charges by anybody. If there is any evidence to charge him with knowledge, it can easily be pointed out. If he knew anything of such a matter, he did not derive his knowledge from his inner consciousness. Somebody told him something. *Who was it, and what was it?*

We proceed now to consider the evidence as to services rendered by Burton.

The charge is, broadly stated, that defendant, as agent and attorney of the Rialto Company, appeared before the Department, the Postmaster General, the Chief Inspector, the Assistant Attorney General, and other officers of the Department, and obtained information respecting the proceeding, and by the influence of his presence and of his office as such Senator, and by statements, representations and persuasion induced the Postmaster General to believe that the Company was not conducting a scheme to defraud, to stop the investigation and to refrain from issuing a fraud order.

The Court, by its instruction to the jury, eliminated the element of merely obtaining information, and confined consideration to action of some kind with respect to the proceeding.

As to officials seen by the defendant, the general statement of the indictment concerning "other officers of said Post Office Department" fails utterly. There was no attempt

to show that he saw any other officer than those specified, unless it be the Fourth Assistant Postmaster General, and this was confessedly with reference to the Brooks Brokerage Company books. (Rec. 161 and 162.)

He saw the Postmaster General but once, and this was also with reference to the Brooks Company books. (Rec. 161 and 162.)

Two witnesses, Kaiser and Hubner, say that on Monday, December 1st, he called to see the Assistant Attorney General, and one of them says he did see him, but what the interview was about he does not know, for he was not present. (Rec. 181-184.) The defendant testified that he had no recollection of any such call upon that officer. (Rec. 248 and 249).

There is nothing in any of the correspondence indicating any interview with the Assistant Attorney General, and no occasion for such an interview. There was nothing before that officer to see him about. The Houts and Evans complaints had been investigated, and were dormant, if not dead, and no new complaints had been made, and none were made, until January. The report of the Inspectors Price and Piatt of August 20th, 1903 (Record pp. 216-225) shows the course of things from beginning to end. No complaints sent in to Washington were considered by anybody there. The Postmaster General did not know of their existence, the Assistant Attorney General did not know anything of them, and even the Chief Inspector knew nothing, save that Houts and Evans had made complaint of some kind. (Rec. p. 167.)

As various letters came in to the Department, they were in course of regular routine sent out to St. Louis by the Chief Inspector's clerk, with the regular printed instructions. He did not even consult his Chief. (Rec. p. 103.)

No official in Washington, higher in authority than George M. Smith, the Chief Inspector's clerk, so much as

knew that there were any complaints against the Rialto Company, until November 20th, when the defendant inquired of Cochran whether there were any such complaints. Cochran made inquiry of a clerk, and thus learned that Houts and Evans had sent in letters, and he imparted what he had thus learned to Burton. This was the only ripple in the routine. Cochran never again did anything in the case. As other letters came in, Mr. Smith sent them out to St. Louis in regular order, and nothing was done there until in July, when an investigation was begun, which resulted in a suggestion of prosecution because of things done in the Rialto Company by Mahaney while Dennis was sick, and in a recommendation by the District Attorney, and by the then Assistant Attorney General, that no fraud order issue, and none was ever issued.

The indictment charges that Burton induced the Postmaster General not to issue the order. And the answer is that the Postmaster General never so much as heard of the case. It never reached him in any manner. Nobody in Washington is shown to have dealt with the case in any manner, except the clerks, until long after Burton was out of the field. Mr. Taylor was the Chief Clerk of the Postal Department. He opened all mail coming to the Department, and sent these letters to the Inspection Bureau. Mr. Smith received the letters and sent them out to the Inspector in charge at St. Louis. The inspector in charge sent them to the inspector in the field. And nobody else knew what was being done. This course of events was not ordered by the defendant, and it was not interrupted by him. He never spoke to, he never saw, the Chief Clerk of the Department, the Clerk of the Bureau, the Inspector in Charge, or the Inspector in the field. He did not reach or influence these people, or any of them, through anybody else. There is no claim that they were influenced by aught save rule and routine.

It may be that a fraud order should have been issued upon investigation of the Houts and Evans complaints, it may be that the letters of Warner, Fravel and Allen should have stirred somebody out of rote into efficient action, but after this defendant had disappeared from the stage, when many more letters had been sent in, when conditions in the Rialto Company had become much worse, the District Attorney at St. Louis and the Assistant Attorney General of the Department advised against the issuance of a fraud order—and these same men now prosecute the defendant for preventing that fraud order, when the only thing actually done by him was to cause the Chief Inspector to know that a complaint had been made. But for Burton, nobody in Washington, save the Clerks Taylor and Smith, would have known anything. As to the doing anything or not doing it, or how it was to be done or not done, this was settled by the rules.

Burton did not influence Taylor or Smith, nor did he seek to. He did not know them. They passed on the letters as they came. He did not influence the Inspectors Dice and Piatt, nor seek to. He never saw them. They proceeded as they thought proper. He spoke to Cochran, but it was only to get information, and as a consequence Cochran got the information also. Did he influence Cochran's action? Cochran does not say so. The prosecution does not say so. Cochran enjoys the confidence of the Government, and has been promoted as a faithful servant. Cochran was not influenced. Matters proceeded precisely as they would have done had Cochran not been informed. The prosecution even took pains to develop and to emphasize in their redirect examination of him that he was not the man to see respecting a fraud order or a hearing concerning one. (Rec. pp. 175-176.) And so the elaborate charge of the indictment that Burton was employed to, and did prevent, the issuance

put upon the letter by the Government is contrary to the facts. The so-called arrangement was not, and could not, be anything more than an ascertainment of the usual custom of the Department to give notice to the parties interested. There is no pretense that anybody else was seen or arranged with. The letter must be read in the light of what it relates to, and not extended in significance by bold and bald conjectures of things not proven nor attempted to be proven.

Harlan's reply shows that there was no apprehension of trouble with the Rialto Company. The subject is dismissed by him with the statement that the complaints have been investigated and reported unfounded. There is no allusion to possible or probable hearings. He arranged to meet Burton in Washington on the next Wednesday, and that is all there is of this matter. Never again is it referred to.

The parties met on Wednesday, and were occupied with the consideration of the Dennis trouble. They did not go about the Department, and felt no occasion for going there.

When Harlan returned to St. Louis he found that Dennis had been indicted, and on November 29th sent a telegram to Burton to that effect. On December 2nd he wrote, giving fuller particulars as to the indictment, and added that complaints against the company might be expected in consequence, but that they would deal with each case according to its merits. He said also, "At your end of the line, you will, of course, use your own judgment in handling the situation. We will at all times be glad to observe any request made by the Post Office Department or to submit to any examination that they might direct." Then he recurred to the indictment, saying that when the case was prepared it would be submitted to Burton for consideration, and said they would appreciate it if he could be present and participate in the defense.

The allusion to "your end of the line" is taken by the

prosecution to mean that Burton was to do something in the Department about the expected complaints. But Burton was not enough impressed with this to answer it or to act upon it. He knew that if complaints came in they would come to Cochran's division, but he did not go there to inquire. He never, save at the first interview, asked whether any complaints existed. It is suggested that he saw Gen. Tyner on Monday, but that was before the letter was written, and besides Tyner would not know whether complaints were being made. And in fact there were none. The next letter to come in was that of Arthur M. Allen on January 5th. No trace of any inquiry, no trace of any action respecting these apprehended complaints is found in the correspondence.

December 3rd Harlan wrote again, advising that persons pretending to be Inspectors were making claims and suggesting that they were impostors. The trial of the Dennis case is then considered. About December 9th Burton called on Cochran and asked whether the men referred to were Inspectors, and was informed they were not. Burton so wrote to Harlan, and said "there has gone from this office no instructions whatever about the Rialto Company, and there is nothing in this office against you at this time." Then the trial of Dennis is referred to. Making the inquiry that Burton did, it was natural for Cochran to answer that the men referred to were frauds, that there was nothing in his office against the Rialto Company at this time. There was nothing. The Houts and Evans letters had been forwarded to St. Louis, and nothing else had come in. The interest of any lawyer in a client would be sufficient to induce him to make such an inquiry. It was a proper one for anybody to make. It carried with it information the Government should possess. And it does not bear the semblance of service to prevent the issuance of a fraud order.

Then Dennis came to Washington to confer with Burton

about his case. Passing the Department building on December 15th, they went in and called on Cochran, and Dennis was introduced with the suggestion that he wanted him to see what manner of man he was, and, with manifest reference to the case against him, Burton said that the trouble had arisen from the conduct of the Brooks Company, and that the new Company was endeavoring to do a straight business. At this time the only complaints that had been made were those investigated at St. Louis a month before, and regarded by everybody concerned as disposed of.

Two other visits were made by Burton to Cochran, one on January 24th, 1903, and the other on February 5th. These had exclusive reference to getting back books of the Brooks Brokerage Company, which had been given by Dennis to the Government for its use in the trial against him. The trial was over, and Dennis had been discharged. He wanted the books, and was entitled to them. Good faith on the part of the Government required that they should be returned. These visits had nothing to do with any fraud order, and nothing to do with any proceeding against the Rialto Company.

The foregoing is all the substantive evidence as to anything done by defendant in or connected with the Postal Department. It proves, and can prove, no service of the kind contemplated by the statute, or that charged in the indictment. There was no appearance as agent or attorney in any proceeding nor before anybody charged with the determination of any proceeding. There were no statements, representations or persuasions that could induce the Postmaster General or anybody else to believe anything. The only thing said by Burton which could have the remotest relation to anything in the Department, known or unknown to him, was the merest incident to the Dennis case, that his troubles grew out of the Brooks Company and Brooks'

management of it, and not out of his Company or his conduct.

This could not influence any man, unless he was subject to be influenced by his own conjecture that the defendant desired him to do an improper thing. The only thing Cochran could do was to obstruct the investigation, to act corruptly and consciously so, for he had no authority to decide upon the case at all. To assume that any such influence was exerted is unjust alike to Burton and to Cochran. There is no hint in anything that was said about discontinuing investigation. Over and over Cochran states that Burton did not assume to know anything of the merits of the complaints, made no representations respecting them, never asked that a fraud order be not issued, and never discussed such a thing as the issuance of a fraud order. See Cochran's testimony, pp. 167-168-175. Nor does Cochran's testimony signify that the defendant refrained simply from speaking of a fraud order in terms. He says that he never informed the defendant of the complaints made after those of Houts and Evans. And the defendant never again made inquiry as to whether complaints had been lodged against the Company. (Rec. p. 173). And having been informed of the mere fact that the Houts and Evans complaints had been made, the defendant made no request "for any information, or action either, * * * and never did." (Rec. p. 174.)

As to testimony which may be claimed to be in the nature of admissions, there is the latter part of the interview of February 5th, as to which the recollection of Cochran must be distorted, as he assumed the Brooks Brokerage Company affairs to be those of the Rialto Company, and the practice of the defendant in the Dennis case to be practice in the Department. Nothing done in the Department, save getting back the Brooks books, could possibly be construed as practice and Cochran had in mind as the subject of the conversation something that did not exist.

The telegram of Mahaney on February 25th and the reply of defendant on February 27th, relate smply to an inquiry as to whether Inspectors had been sent out, and the answer was that none had been. It involved at most an inquiry by Burton whether anything was pending, and the information to him that there was not.

Mahaney's testimony as to the interview with Burton is, as to its essential features, denied by Burton. But what is more to the purpose, it contains not a word respecting anything done by Burton which can add to or take from the force of the substantive testimony.

The testimony of Brooks is that of a man under conviction of crime, played upon by hopes and fears, and moreover, filled with resentment because of the way in which he figured in this case. He says that one Kastor said in his presence and in the presence of the defendant, and having reference to the defendant, "Here's the man who has defeated you in your fight against Dennis and stopped the issuance of a fraud order." The defendant denies that any such statement was made. The time of this alleged statement was in the early part of January, 1903. Dennis had not yet been tried, and Brooks had not attempted to secure the issuance of a fraud order against the Rialto Company. Every letter sent to the Department which is in evidence shows that it was sent on the writer's own initiative. Houts and Evans feel that they have a grievance, and seek redress. Warner objects to the "gamble in grain," and so through the list. The statement, even if made, was a false statement. The only report that would go against the issuance of a fraud order was that made by Price before Burton came upon the scene, and no complaints, other than those investigated and reported upon by Price, came into the Department until January 5th.

The newspaper interviews introduced in evidence add

nothing new. They are simply characterizations of what had been done. They stated nothing as having been done which was not fully testified to by Cochran and Burton. They both make the Dennis indictment the central feature of the case.

The interview with Cochran in March, 1904, like that with the newspaper men, leaves the question of what the defendant did precisely where the substantive testimony leaves it. At the time of this interview, Cochran was under the impression that the matter of the Brooks Company books was an affair of the Rialto Company.

Support for the indictment must be found somewhere in the five calls upon Cochran. There is no tangible suggestion as to anything done at any other time, and as these do not show anything beyond a simple inquiry as to the existence of charges made of an officer who had no authority to pass upon them, and who was not requested to take any action concerning them, we submit that the defendant neither prevented the issuance of a fraud order, nor attempted to do so.

At the close of the testimony for the Government and again at the close of all the testimony, the defendant requested an instruction for a verdict of not guilty, generally, and specifically as to each count. The Court erred in refusing this request, because the evidence disclosed that it had no jurisdiction of the case, and because the evidence also showed that there was no proceeding pending in the Department, and that the defendant had rendered no services for the Rialto Company which were prohibited by law and had made no agreement to render any such services.

The Court erred also in the instructions which it gave to quests of the defendant numbered 1, 2, 5, 11 and 12.

VI.

The Agreement of Defendant with the Rialto Company was by the Month, and No Service in the Department Having Been Rendered by the Defendant During the Period Covered by the Payment Made March 26th, There was No Offense in the Receipt of That Payment.

The Court refusel to direct a verdict of acquittal on the third and seventh counts, and also refused to give the following instruction requested by the defendant, viz:

> "If the jury find from the evidence that the defendant was employed by the Rialto Grain and Securities Company by the month, at a salary of five hundred dollars per month, for a period of not less than five months, and that for the month covered by the payment of March 26th, 1903, he rendered no services in the Postal Department in any proceeding there pending looking to the issuance of a fraud order order against the company, then they should find the defendant not guilty on the third and seventh counts."

Harlan testified (Rec. p. 131), that

> "He (Burton) thought he should receive five hundred dollars a month. To that I made no reply; but continuing he said, 'I don't think I ought to be shut off, however, at the end of a month; for instance, I would not want to go down and try that case, should Major Dennis be indicted, and then have this employment shut off.' He says, 'I think it ought to continue for at least five months.' I replied, 'Why, certainly, that is only fair.'"

Burton testified (Rec. p. 234):

> "When we came to the subject of fees, he asked me what I considered right as a salary per month. I don't know just how I got at it, but I think I mentioned $500 a month; and after some dickering backwards

and forwards, or waiting, I don't remember which, he seemed to be satisfied. I said, 'Now, Mr. Harlan, of course I don't want the responsibility of a case, or helping in a case of this kind'—I am trying to remember just the words there I used.

Q. Give the substance of it? A. At any rate, 'I don't want to be retained in a case of that kind, for a man who was rich, for $500. The case might pass off within a month.' He said, 'Oh, that is not contemplated at all, Senator. You can help us in this other matter that we intend to come up; and as to that matter, time can be mentioned.' Whether he mentioned it or I did, it was to be $500 a month for not less than five months. And he made the remark, 'It will not terminate then unless you terminate it.' No—so far as I remember, that was the substance of what was said.

When I parted with him that night he said he had no authority to contract, but he would recommend that I be employed. And if it was decided to employ me he would come on to Washington for a full conference."

Following this conversation, Harlan wrote to Burton on November 18th, "this company accepts your terms to act as counsel at a salary of $500.00 per month; said service to begin immediately, that is of this date, November 18th, 1902," and Burton responded on the 20th, "In return, if agreeable, you may make remittance for my first month's pay."

This is all the evidence in the case bearing upon this phase of the agreement.

The payment of March 26th was on account of the month beginning March 18th. There is no evidence whatever that Burton rendered any service of any kind for the company during this month.

The agreement between the parties, whether it was to run for five months or from month to month, was severable, alike as to the obligation to pay and the obligation

to render service. The salary of five hundred dollars per month was payable for the service of a month, and, being paid, there was no further liability on account of that month. If Burton had quit the service of the Company on the 17th of December, he would not be entitled to any more pay, because he had worked but one month, and had been fully paid for it. Had the Company broken the agreement on the 17th of December, assuming that it was for five months, Burton would be entitled to recover for the subsequent months only in the event that he was ready and willing to perform service during those months. The contract is severable when one agrees to work for a definite term, as a year, at wages payable weekly, monthly or quarterly.

Davis vs. Preston, 6 Ala., 83.
Matthews vs. Jenkins, 80 Va., 463.
La Coursier vs. Russell, 82 Wis., 265.

In Davis vs. Preston the case was assumpsit upon a written agreement for Preston's services as superintendent of Davis' mills for one year, $300.00 to be paid at the expiration of six months and $300.00 at the expiration of the year. The breach assigned was that defendant had not paid the sums of money, or either of them. The Court said:

> "The defendant then insists that no recovery against him could be had, unless the service was performed for the entire time; and that plaintiff's abandonment of his service previous to the expiration of the year prevented any recovery in the action as brought. This view of the contract cannot be sustained. It is true, the agreement of the plaintiff was to serve until the expiration of the year; but defendant was to pay him one-half in June, and the balance in January afterwards. It may be conceded, therefore, that no recovery could be had for the last payment, and yet the right to recover the first would not be affected. * * * The case is not different from that of an agree-

> ment to pay a given sum in installments; and in such, cases, when the consideration of the payment is service, it is only necessary to show a performance *pro rata*. (Cunningham vs. Morrell, 10 Johns., 203.) A contract for the payment of distinct sums at different periods is very much in the nature of distinct contracts, and an action of debt for each one will lie as it becomes due. (Faw vs. Marsteller, 2 Cr., 24.)"

This Court in Benedict vs. United States, 176 U. S., 357, said that

> "the word salary may be defined generally as a fixed annual or periodical payment for services, depending upon the time and not the amount, of services rendered."

Take what view of this case we may, it is clear that the defendant was not employed exclusively to render services of the kind which would make the employment illegal. He was expected to do other things, and did other things. This was recognized by the Court in its instructions. The jury were told that service with respect to the Dennis case and the Brooks books would not support the indictment. The only thing shown to have been done after December was with reference to the Dennis case and the Brooks books. So far as periodical compensation is related to service, it must be related to the service rendered during the period. There is not even a fiction of law that a man being employed for a year at a stipulated sum per month, that each months' pay is compensation for every month's service.

We moved for a verdict on these counts, and as to this point the Court ruled:

> "The contract, while for convenience providing for payment of the compensation in monthly installments, was not divisible in the sense suggested, but was an entirety, and each payment thereunder was to be in part consideration for the entire service." (Rec. p. 286).

We submit that if the Court was right as to the effect of such a contract, it was still a question of fact for the jury to determine whether any such contract had been made, and by our twelfth instruction we asked that the question of fact be submitted to the jury, but this was refused.

The Court in effect, by submitting the case as it did, determined what was exclusively for the jury, that the agreement between Burton and the Company was not what it purported to be, but was a mere pretext and cover for paying twenty-five hundred dollars for certain services in the Department.

The ruling of the Court that employment for a fixed term at a stated salary per month is an entirety, both as to service and compensation, that is, every dollar of payment stands as compensation for each and every act of service, can have no place in a case like this, for it would lead straight to a violation of the Constitutional provision that no person *shall be subject* for the same offense to be twice put in jeopardy.

The receipt of compensation in itself is no offense; it must be related to and combined with the rendition of a certain service. The one is as much an element of the offense as the other. The employment of the defendant might as well have been for five years as for five months, and then if during the first month he had done one act of the inhibited kind, and never another, if during the rest of the five years, every service rendered by him was lawful and proper, still, as the first month's service was every month being compensated anew, as on the last day of his long term he was still getting pay for his first day's work, so he, every month, would commit his offense afresh and incur a new penalty for his guilt. He had done just one wrong thing, and in doing that wrong, had committed a crime, and then he had gone on month after month for

sixty months *repeating the crime, but without repeating the wrong.*

Such a result does not commend itself to the sense of justice. It makes a person subject for the same offense to be many times put in jeopardy. The Government, on the trial of the first indictment, put this defendant five times in jeopardy of the same transaction, undertaking to make a distinct and severable offense of each and every receipt of compensation taken in connection with the same act of service. This Court has decided that this may not be done, in the case of Hans Nielsen, 131 U. S. 188, saying:

> "It seems to us very clear that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."

The compensation received by defendant in the City of St. Louis on March 26th, 1903, was for the monthly period beginning March 18th. It is not pretended that he was near the Department or any Department officer during that time, or that he did aught that can be construed into the rendition of service.

During this month, March 15 or 18, to April 15 or 18, 1903, for which the month's pay of $500 was made in cash to Senator Burton, no services whatsoever before the Post Office Department were performed by Senator Burton for the Rialto Grain and Securities Company, and there is absolutely no evidence whatsoever showing or tending to show any such services during that month, nor any such services whatsoever after February 27, 1903. On the contrary the evidence shows affirmatively that there were no such services.

There can be no doubt that each month's pay was for each month's services. Suppose, for example, that at the end of the second month's service, say January 15 or 18, 1903, Senator Burton had died; his executor could not for a mo-

offenses, and the defendant be tried and punished for each?

The statute provides that

> "No Senator * * * shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding. * * * Every person offending against this section shall be deemed guilty of a misdemeanor, etc."

One offense, and but one, is defined by this statute, which, however, may be committed in various ways.

The offense is committed by agreeing to receive compensation for services rendered, although the compensation is not in fact paid. The evil contemplated by the statute and guarded against by it, the interference by a Senator under the stimulus of personal gain, with the orderly operations of the Department has been done.

And so if the compensation has been paid, and the services are not in fact rendered, if it has been agreed to render them, there has been a positive wrong committed. The forbidden fruit has been enjoyed by the Senator, and the integrity of Department operations has been seriously menaced.

Whether, if the transaction does not pass beyond mutual promises, on the one side to pay and the other to serve, and is then abandoned, no act in performance of either promise being done, an offense is committed, we need not here consider, but we do not believe there would be.

But surely, each step in the transaction, where it is completed, as where the agreement is made and performed on each side, is not a distinct offense. If so, then the transaction might be split up into, (1) the agreement to receive compensation for services to be rendered, (2) the agreement to receive compensation for services rendered, (3) the receipt of compensation for services to be rendered, and (4) the receipt of compensation for services rendered.

The agreement inheres in every completed transaction as

a part of it, just as an assault inheres in a battery. To launch the blow is an assault, and if it reaches home it is a battery. But there are not two offenses in the latter case. There is but the one offense in either case, and there may be conviction of a simple assault under the charge of assault and battery. That the assault is effective may be a matter of aggravation, but does not make a new and additional offense.

2 Bishop's New Criminal Procedure, Sec. 55.

If the indictment in this case had charged in a single count that the defendant agreed to receive, and did receive, compensation for services to be rendered and rendered by him, it would not be bad for duplicity. This was in fact done by necessary implication in the original indictment in the former case, and the very evidence here offered to prove the charge of two offenses was there offered to prove the charge of one. The law governing the case is thus laid down in 1 Bishop's New Criminal Procedure, Sec. 436:

> "A statute often makes punishable the doing of one thing, or another, or another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all, violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore the indictment on such a statute may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction *and* where the statute has "or," and it will not be double, and it will be established at the trial by proof of any one of them."

A statute of Missouri punishes "every person who shall wilfully set fire to *or* burn any dwelling house, etc." In State vs. Jones, 106 Mo., 302, the indictment charged that the defendant "did set fire to *and* burn, etc." It was contended that the indictment was double, charging the two

offenses of setting fire to and burning the building, but this contention was overruled.

The claim of the Government here is that the defendant made an agreement with the Rialto Company to render certain services for a certain compensation, and that in pursuance of this agreement, and in performance of it, he rendered the services and received the compensation. Here was one transaction and one offense. This involves all the various means mentioned in the statute, and while proof of any one of them would have sustained the indictment, proof that all the means mentioned were employed showed no more than that there was one violation of the statute and one penalty incurred.

All the proceedings below treated the alleged agreement to render services as one offense, and the rendition of the alleged services as another offense, and accordingly the Court rendered separate judgment and sentence on the *sixth* count for the alleged illegal agreement, and on the *seventh* count for the alleged illegal services, imposing a separate fine in each case and a separate punishment. On the same principle this offense could have been split up into four.

This course of procedure is contrary to the rules of Criminal Procedure and also to the provisions of Sec. 1035 of the Revised Statutes of the United States, which reads as follows:

> "In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged; *Provided*, that such attempt be itself a separate offense."

VIII.

The Juror William V. Jones Had an Opinion on the Merits, Formed by Reading What He Believed to Be Correct Reports of the Former Trial, and the Challenge to Him Should Have Been Sustained.

The examination of Mr. Jones may be found on pp. 37, 38, 39, 40, 41 of the record. It showed that he was present in the city during the former trial and read the evidence as it was reported in the newspapers from time to time. He had "an opinion as a result of the other trial," and this was "predicated on the evidence as presented in the newspapers from time to time." "And upon a similar showing, he would have, naturally, the same opinion." He recalled what that opinion was. He could not put it out of his mind, and it would have the same influence that any other opinion he possessed would have.

To the Court he answered that he did not know the defendant, was not conscious of having talked with any witness in the case, and that his opinion was based entirely upon newspaper reports. The further examination of the juror by the Court was as follows:

> "Q. Did the reading of the newspaper reports produce in your mind the conviction that that which was there stated was true, or was the opinion which you formed one to the effect that if what was stated in the newspapers was true, then your opinion in the case would be along some particular line? A. If the report in the newspapers was correct, I had formed a certain opinion.
>
> Q. Have you now an opinion, or conviction, as to whether the statements in the newspapers were correct? A. Well, I believe them to be correct.
>
> Q. Do you understand that there is a mere newspaper report of the proceedings here? A. Yes, sir.
>
> Q. And that in all probability is not a perfectly ac-

curate and complete statement of the evidence as presented at the trial? A. That was the impression I had at the time that the statements reported in the newspapers were in the main correct. I did not pay any particular attention to reading the reports afterwards.

Q. Were you taking a particular interest in the case at that time? A. No, sir.

Q. What do you say now as to whether you can enter upon the trial of this case and be governed by the evidence as it shall be delivered by the witnesses, and by the law as it shall be stated to you by the Court? A. I believe I could give an impartial judgment in connection with it, except that I might be unconsciously influenced by what happened before, what I had read in the newspapers previously as to what took place at the other trial; but only in that respect.

Q. It is the law that on the trial of this case the defendant is presumed to be innocent, and that the Government must now, by the evidence here to be presented, establish the guilt of the defendant beyond a reasonable doubt. It is the law that no matter of rumor or report or other unreliable and loose matter can be at all considered.

So I ask you, can you enter upon the trial of this case, and give to the defendant, in the beginning and during the trial, the presumption of innocence to which he is entitled, save as it may be overcome, if it is, by the evidence here presented? A. Yes, sir, I believe I could.

Q. And do you or do you not believe that you can rest your verdict, therefore, upon the evidence here presented, when viewed in the light of the law, as it shall be given by the Court? A. I believe that I could give an impartial opinion, irrespective—except that I might be influenced unconsciously by the other.

Q. Are you conscious now of any opinion or inclination in the case which would tend to prevent you from rendering a verdict solely upon the evidence and the law as it shall be given you by the Court? A. No, sir."

The defendant was deprived of a substantial right re-

garding his peremptory challenge by the overruling of his challenge, as he was entitled under the express words of the Sixth Amendment of the Constitution to have rendered to him a panel of *impartial* jurors, under the rule laid down by the Court before being required to make his peremptory challenges.

This Court in Lewis vs. United States, 146 U. S., 370, speaking by Mr. Justice Shiras, says:

> "The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury. As was said by Blackstone and repeated by Mr. Justice Story: In criminal cases, or at least in capital cases, there is *in favorem vitae* allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors without showing any cause at all, which is called a peremptory challenge; a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous. This is grounded on two reasons; As everyone must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried *by any one man* against whom he has conceived a prejudice even without being able to assign a reason for such dislike. 2. Because, upon challenge for *cause shown*, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside."

The right of peremptory challenge is a valuable right, and if the defendant is forced to expend this peremptory challenge upon a juror who should have been excused for cause, then he is deprived of the right to exert this peremptory challenge against other jurors, who he is im-

pressed would not be impartial, but cannot show cause therefor.

The Juror Jones repeatedly states that he has formed an opinion as to the guilt or innocence of the defendant; that at the time of his examination he had that opinion; that it was predicated upon reports of the testimony at the former trial, would necessarily attend him in the jury box, and that he could not put the opinion out of his mind; that it would have the same influence any other opinion he possessed would have; that he believed the newspaper reports of the testimony at the last trial to have been correct, and under examination by the Court states: "I believe I could give an impartial judgment in connection with it, *except that I might be unconsciously influenced by what happened before.*"

The entire examination of this juror indicates that he was in a state of doubt as to whether he could become an impartial juror; that he was in a state of doubt as to whether his prior opinion could be eliminated, or whether it would affect his verdict.

In the case of Williams vs. United States, C. C. A. 9th Ct., 93 Fed. Rep., 396, it appears that a juror had formed an opinion, and, replying to the following question by the Court: "Do you think you will be able to sit as a juror and return a verdict based solely upon the evidence that you would hear? the juror answered: "I am not infallible. From what I said I think I would. I think I possess a natural sense of justice, I think I would; I feel that I might."

The same state of uncertainty appeared to exist in the mind of Jones in his examination in this case that appeared in the mind of the juror in Williams vs. United States.

Commenting upon the answers of the jurors in the Williams case, the Court says:

> "Certainly this answer also indicated a decided doubt in the mind of the juror whether he would be able to

disregard the strong prejudice derived from his discussion of the case with the defendant's former attorney therein, and be controlled solely by the evidence introduced on the trial. *The law does not, and cannot, deem such a juror impartial.*"

That Mr. Jones would endeavor to do justice, that he would, so far as in him lay, decide alone upon the evidence produced at this trial and the instructions of the Court thereon, we may well believe, and so we might believe of the juror Koehler, challenged by the Government and excused by the Court. The difference between talking with a witness and reading the evidence cannot be very great.

The suggestion of the Court, and a suggestion from the Court in such cases comes with great weight, that the newspaper report was "in all probability not a perfectly accurate and complete statement of the evidence as presented at the trial" was, we say it with due respect, hardly fair. The juror himself believed it was correct, and had an opinion formed in that view.

As it was not competent to bring in those reports and compare them with the record of the trial, the only presumption that would aid in getting an impartial panel, was that the reports were correct, and hence that the juror had an opinion based upon a reading of all the evidence, an opinion of which he could not rid himself, and which he would adhere to from beginning to end, the evidence being substantially the same.

The Court's suggestion was calculated to depreciate the juror's estimate of his opinion in its relation to his qualification to sit in the case, without diminishing the force of the opinion itself, and so to lead the juror to believe himself qualified in the judgment of the Court, despite an opinion formed upon a consideration of all the testimony in the case.

IX.

The Contents of the Letters of Houts, Evans, Allen, Warner and Fravel, were not Competent Evidence in the Case, as they Related to Matters which were Immaterial, and which, Therefore, the Defendant could not Rebut.

Objections were made and exceptions saved as to each and all of these letters, and error was duly assigned, but for convenience they can be well considered together.

These letters and accompanying circulars and booklets were read in full to the jury, and they occupy the record from page 48 to 87 inclusive.

The Court, it is true, told the jury when the first letter was offered that this, and others which would follow, was admitted "only for the purpose of showing that there was a proceeding pending before the Postmaster General in respect to whether the Rialto Grain and Securities Company was abusing the mail privilege, within the meaning of the charge of the indictment. The letter is not admitted in evidence for the purpose of establishing the truth of that which is stated in the letter, because that is a matter foreign to our present inquiry." (Record p. 49.)

The present inquiry, as bearing on which the letters were received was, whether there was "a proceeding pending before the Postmaster General in respect to whether the Rialto Grain and Securities Company was abusing the mail privilege."

Assuming for the present purpose that what existed constituted "a proceeding pending," what was necessary to show it?

It was contended by the Government that the defendant was advised that there was a proceeding pending when he was informed by Cochran on November 20th that complaints had been received by the Department from Houts

and Evans, and that these had been sent to the Inspector in Charge at St. Louis for investigation. If this was sufficient to advise the defendant, it was sufficient to advise the jury. If this fact, which was all that the defendant learned, charged him with knowledge of the pendency of a proceeding, then, this fact being proven, the pendency of the proceeding was proven. This fact was proven by the evidence of Taylor, Smith, Cochran, Davis and Price, and by the original and the carbon jackets. The evidence of these witnesses and of the jackets proved that the Government had the matter under investigation.

Under the issues presented by the indictment, and as construed by the Court, it was open to the defendant to show, if he could, that no letter had been received by Taylor and sent by him to the Bureau of Inspection; that no letter was received by Smith and jacketed by him and sent to Dice; that Cochran never told him that any letters had been received and sent out to St. Louis; that no letters were ever sent to St. Louis and that no investigation was ever made there.

And it was not open to the defendant to show that the letters were not true; it was not open to him even to show that they were not genuine. If the letters had been forgeries if no such persons as Houts and Evans existed, still if somebody wrote those letters and sent them in, and the Department acted upon them, in the view of the Court below there was "a proceeding pending."

By the reading of the Evans letter, the jury were told that Mrs. Evans had sent thirty dollars to the Rialto Company for investment, and the Company had not acknowledged receipt of it, and refused to answer her letter of inquiry.

By the reading of the Houts letters, the jury were told that Mrs. Houts had been swindled by the Company out of fifty dollars she had sent on the promise of great gains

therefrom, which she had intended to use to pay the expenses of a visit to her son, who was serving in the Philippines as a member of the Eighth Cavalry.

Of these facts Burton had never been advised, they were immaterial to the issue, and could not therefore be controverted, but they necessarily were prejudicial to the Rialto Company and to everybody connected with it in any manner.

Then came the Allen letter, with a circular setting forth inducements for speculative dealing in corn, and a pamphlet entitled "Golden Gain from Golden Grain," which very greatly elaborated the matter of the circular.

Of the existence of this letter, circular and pamphlet, the defendant never had any knowledge.

January 17th, 1903, Mrs. Warner writes, and she protests against "the whole gamble in grain and food stuffs," and thinks those who conduct it should "receive the same justice allotted to Card Sharpers and Green Goods men, who are Christian gentlemen beside them." She also sent a copy of a pamphlet entitled "Great Oaks from Tiny Acorns Grow," in which it is shown how by speculative dealing in grain, great fortunes may be made.

Of the existence of this letter and booklet the defendant had no knowledge.

Fravel also wrote a letter, enclosing a circular advising him to speculate in corn, and he in his letter thinks it is a case of fraud because, upon the plan of dealing suggested, the Company may claim that orders were not mailed in time to catch the market at the favorable point.

Of the existence of this letter and circular the defendant had no knowledge.

This "literature" assumed to give much and interesting information concerning corn. The reader was told that the area for corn production was ascertained and limited; that the uses of corn were continually increasing in number

and extent; and that the tendency of the price must therefore be upward. All this may be true, and in itself is not to be characterized as a fraudulent representation. The reader was also told what is certainly true, that mere working and saving is a slow way of making money, and that the great fortunes are the result of speculation and investment. The prices of corn in the recent past are stated, showing marked fluctuations, followed by mathematical demonstrations, that great profits would have been secured by the reader had he been in the market, and always on the right side of it, at the time of these changes. Examples then are given of persons who were in the market and who, beginning with small amounts, by reinvesting their gains realized very great profits. This is set forth to illustrate that what rich men do with large sums of money used in speculation, can be done by the poor in comparative measure with small sums.

There are some very good people who believe that extensive speculation upon our Boards of Trade is entirely proper; there are others, very good people also, who agree with Mrs. Warner in denouncing "the whole gamble in grain and food stuffs;" and of the first, who believe it to be proper enough when conducted upon a great scale by people who can afford it, many still believe it to be bad when carried on in a small way by people who cannot afford to lose what they venture, just as there are many who while they believe that if it is not a positive virtue, it is at least a social grace and accomplishment to drink costly wine at a beautiful festal board in a mansion, still believe it is a great wrong to drink cheap liquor in a groggery. These pamphlets pointed the way to speculation upon a small scale, and incited to it by alluring statements of the gains possible to be made.

This could not be met by the defendant in any way. He would not be permitted to show, if he could, that the state-

ments in these pamphlets were true; he would not acquit himself by persuading the jury, if he could, that the business described was fair and lawful, it was not even open to him to show that no such "literature" was ever sent out by the Company, but there it was in the case against him for every evil influence that its extravagant rhetoric could exert upon the minds of the jurors who thought either that "the whole gamble in grain" was wrong, or that the gamble by small people upon a small scale was wrong.

The inferences insisted upon were that in ordinary and regular course, a vigorous investigation would speedily follow upon such a showing as this to the Department, and as months passed and nothing was done, there must have been some sinister influence at work obstructing inquiry and preventing the issuance of a fraud order. Then too, the mere association of this with the defendant was hurtful, none the less that he never saw a line of it all. It puts a taint upon the Rialto Company, and, through the contact enforced in this case, upon the defendant himself.

It was not within human power to limit the thirty printed pages of this testimony, and which it took hours to read, in its effect to proving simply that complaints of some kind had been received and that an investigation had been directed. The nature of the complaints was impressed, strongly impressed, upon the minds of the jurors. How were they indeed to escape it, not trained to distinguish between the material and the immaterial, when by counsel upon the hearing of the first case before this tribunal, this very "literature" was presented in his brief as proof at least tending to show guilt. If the Government's representatives believed that the "bucket shop," "small speculative ventures," "speculative craze," and "company's dupes" features of this evidence were significant, then we may assume that the jury believed them to be so, and as they were immaterial to any issue the defendant was called upon to meet, or would be permitted to meet, they should not have been admitted in

evidence. They were not essential to prove any pertinent fact, they related to no averment in the indictment, save that cunningly phrased one that the Rialto was *pretending* to carry on the business of buying, selling and dealing in grain and securities * * * on its own account and as agent for others."

Tappan vs. Beardsley, 10 Wall, 427, was a suit for libel. The plaintiff offered, and was permitted, to read in evidence the record of a divorce suit brought by the plaintiff's wife against him, the answer and depositions of which reflected upon the defendant in the libel suit. The only thing relevant, if anything, was the fact that a divorce suit had been instituted. Mr. Justice Miller, speaking for the Court, said:

> "The effect of this in aggravating the damages to be recovered is too plain to require comment. And yet Tappan was no party to that suit; had no right to control or influence the making of that record; could not cross-examine the witnesses, all of whom were Beardsley's, nor take any exceptions to or contradict Beardsley's answer. It is difficult to conceive upon what principle the record of that suit was admissible for any purpose whatever in the trial of this one. If the defendant had introduced any evidence to show that a suit for divorce had actually been brought, in support of his statement that there was a rumor that it would be done, then it might have been competent for the plaintiff to show when it was instituted, as some evidence that no such rumor existed when Tappan so reported. But it does not appear that Tappan attempted to show in this suit that the divorce suit had ever been instituted. All that comes from the plaintiff; and it is difficult to see what relevancy it had to any issue before the Court. If, however, a state of case could possibly have existed to justify the introduction by the defendant of that record for that purpose, it could be used for no other, and the answer of Beardsley and the depositions of the witnesses were not only irrelevant to the issue then being tried, but they were forbidden by other well established rules of evidence."

Everything of evil connected with the so-called "proceeding" however irrelevant, was read in evidence in full against the defendant, but when something was offered that would have a good effect, it was excluded.

X.

The Endorsements on the Jacket Subsequent to March 26th, 1903, the Report of Inspectors Price and Piatt of August 20th, 1903, and the Letter of Assistant Attorney General Robb of September 9th, 1903, were Competent and Material Evidence for Defendant to Disprove the Charges of the Indictment that he had Agreed to Induce, and Had in Fact Induced, the Postmaster General to Issue No Fraud Order Against the Company and to stop investigation of it, and also to Show that the Investigation Being Made by the Department was with Reference to the Indictment and Prosecution of the Officers of the Rialto Company.

The charge of the indictment is that the defendant by the influence of his personal presence and official station and by his statements, representations and persuasion, induced the Postmaster General to believe that the Rialto Company was not conducting a scheme to defraud, such as that described.

To support this allegation, the Government offered evidence which certainly did not directly prove it, as it did not show that the defendant had ever seen the Postmaster General respecting the matter, or any one else who had anything to do with determining the question.

The most pregnant fact shown was that no fraud order was issued during the period of defendant's connection with the Company. That the case was not "closed" on March

26th was permitted to be shown by the Government and the inference was permitted to be drawn that this was because of defendant's interference.

The jacket showed that after March 26th complaints continued to come in, more of them than before, and still the routine was continued as before, Taylor receiving the letters in the first instance and sending them to Smith, and he sending them to Dice, who in turn gave them to Price.

Any possible agency of Burton was at an end. He had never done anything openly to stop investigation, and if he had exerted a secret sinister influence, he was doing so no more. The flow of events, however, was languid as ever. It was competent to show this to rebut the inference that because a fraud order was not issued in a case in which the jury were given to understand that it should have issued, an aggravated case, somebody must have done something to prevent it, and that somebody was Burton. But if he was the cause, then his removal would make itself manifest in some way, and if the matter proceeded in the same routine, it was a circumstance to show that no agency of his had effected anything. Looking before and after, everything is the same. There is no significance in the fact that nothing had been done by March 26th. He had not asked that action be withheld, he had not been promised by anybody that it would be. There is no one shown to have been paralyzed by his personal presence or official station. There was nothing in the situation before or after that was different as the result either of addition or elimination.

There did come a marked change in the business of the Rialto Company on June 17th, 1903. Dennis was still sick in California. Mahaney was in charge and he did on that day what the Inspectors in the field, when they discovered it, regarded as a wrong and a fraud. Complaints at once came in from the patrons of the Company. The carbon jacket records one on June 23rd, two on July 2nd, three on

July 11th, one on July 21st. The course of events now was changed.

On July 27th Field Inspectors Price and Piatt began an elaborate investigation, and continued it until August 20th, when they made their report to Dice, the Inspector in Charge. (Rec. pp. 216-225.)

They covered the Company's operations from January 1st, 1903. They say that "as 'bucket shops' that are conducted through the mails exist, it is believed that the Rialto Company has conducted a fairly honest business, with the exception of the deal of June 17th." This deal, they say, was made by Mahaney to cover embezzlements of the Company's funds by himself and McRae. Dennis they seem to regard as "fairly honest," but whether on moral or prudential grounds, they do not commit themselves. They do say that he is undertaking to right the wrongs done by Mahaney. Upon the whole they are *"disposed to accept District Attorney Dyer's advice to recommend no fraud order."* The investigation, they say, was entered into and made most thorough because it was believed, that in spite of seeming adverse rulings in Dennis' and other cases, "an indictment might be drawn against these Companies that might make possible a successful prosecution, and hopes are still entertained that a way may be found to accomplish this most desired end, as per District Attorney Dyer's statement that he will place the whole matter before the Grand Jury after it shall receive the charge from the Court in reference to what he believes to be the law."

Thus the purpose of the investigation was to determine whether section 5480 had been violated, and the end of it was to recommend a prosecution under that section.

Moreover, it dispels mystery respecting the course and progress of the Rialto investigation. The Houts and Evans complaints were promptly investigated and reported upon as unwarranted. Fravel, Allen and Warren made no com-

plaints, they simply sent in the literature of the Rialto Company, which in itself the Inspectors evidently believed called for no action, and warranted none, inasmuch as Judge Adams had held in this very District that the conduct of a bucket shop or of gambling operations was not of itself a violation of the Federal law. And according to the report, as bucket shops go, the Rialto Company "conducted a fairly honest business" until June 17th. When, after June 17th, complaints of actual fraud came in, frauds committed under the management of Mahaney and McRea, a thorough investigation was promptly entered upon. In short, every case of a charge of fraud shown by this record to have been made, was investigated, and promptly. There was no holding back by anybody, and no obstruction interposed anywhere.

And when this full investigation had been completed, District Attorney Dyer, who seems to have been consulted throughout, recommended that no fraud order be issued. It is not contended by the Government that Mr. Dyer was influenced in his recommendation by Senator Burton or anybody else.

September 9th, 1903, Mr. Charles H. Robb, who assisted Mr. Dyer in the prosecution of this case in the Circuit Court, was the Assistant Attorney General for the Post Office Department. The report of the Inspectors Price and Piatt came before him for action. He reported upon it to the Fourth Assistant Postmaster General, saying: "I have considered the report of the Post Office Inspectors and the papers submitted in the case of the Rialto Grain and Securities Company of Saint Louis, Missouri, and in accordance with the recommendation of the Inspectors, *will close the case without further action by the Department at this time.*" He proceeds then to state his views generally, which are that so long as these companies invest the money placed with them in good faith in stocks or grains, they are simply gambling, but if they do not, and divert the money to their

own use, they are guilty of frauds, and he would recommend the issuance of a fraud order. So too, if false and fraudulent representations are made as to the amount of profits realized on investments. (Rec. p. 226).

It is not contended by the Government that Mr. Robb was influenced by Mr. Burton or any one else, and yet, here he is disclosed as the man who prevents the issuance of the fraud order. His action is in confirmation of the recommendation of the Inspectors, which in turn is predicated upon the advice of District Attorney Dyer.

Who stopped the fraud order against the Rialto Company? Three documents in this case make answer; the report of the Inspectors, the recommendation of the Assistant Attorney General for the Post Office Department, and the indictment. In the first the District Attorney speaks through the Inspectors, in the second the Assistant Attorney General speaks for himself, in the third the District Attorney and the Assistant Attorney General speak through the Grand Jury, but none the less, it is they who speak. Let us bring these answers together, for convenience, slightly condensing, but not altering the sense of the indictment:

> *"As 'bucket shops' that are conducted through the mail exist, it is believed that the Rialto Company has conducted a fairly honest business, with the exception of the deal of June 17th, and we are therefore disposed to accept District Attorney Dyer's advice to recommend no fraud order.*
>
> M. G. PRICE,
> W. B. PIATT,
> *P. O. Inspectors."*

> *"I have considered the report of the Post Office Inspectors and the papers submitted in the case of the Rialto Grain and Securities Company of Saint Louis, Missouri, and in accordance with the recommendation of the Inspectors,* WILL CLOSE THE CASE *without further action by the Department at this time.*
>
> C. H. ROBB,
> *Assistant Attorney General for the Post Office Department."*

The said Joseph Ralph Burton by the influence of his presence and of his office as Senator and by statements, representations and persuasion induced the Postmaster General to believe that the Rialto Company was not conducting a scheme to defraud, and so induced him not to issue a fraud order.

DAVID P. DYER,
U. S. District Attorney.
C. H. ROBB,
U. S. Assistant Attorney General.

XI.

It was Not Competent for the Witness Cochran to Testify that he would have Informed Anyone on November 20th, 1902, whether or not there were Complaints Against the Rialto Company, but Would Not have given the Names of the Complainants, and that he gave them to the Defendant because he was a United States Senator.

Cochran testified that on November 20th, 1902, the defendant called and asked "whether any complaints had been received or any investigation was under way with reference to the Rialto Grain and Securities Company." He told the defendant that there was such a case, and without being asked therefor gave him the names of the persons on whose complaints the case was jacketed.

He then testified in response to questions by the District Attorney, and over our objection, that he would probably have given to any one inquiring, the fact that a case had been made up, but would not have given the names of the complainants, and he gave these names to the defendant because he was a Senator of the United States. (Rec. 159 and 160.)

This was clearly prejudicial to the defendant. It was

accusation and not evidence. Anyone had a right to inquire at the Department whether charges were pending against some person, and one person has as much right to be fully informed as another. The charge against the Senator was rendering service in the Department for pay. The service and compensation must co-exist to make the offense under the statute. And the service in and of itself may be laudable, and may properly be rendered by a Senator, but if so, must be rendered without pay. As to this matter there could be but two questions, (1) was it, under the circumstances, service in a proceeding pending in the Department, to prevent a fraud order, and (2) was it rendered for compensation? Whether the inquiry was in itself a proper one, was not involved, nor was the propriety of the answer. The reason stated for giving the names of complainants was not disclosed to the defendant, and he was not to be disparaged by something hidden in the inner consciousness of the witness. He had asked simply whether there were any complaints, and not who the complainants were. Inquiring in the same terms that others would inquire, and getting a fuller answer, he is not to be charged, therefore, as having done wrong in making the inquiry, unless it was wrong in itself to make the inquiry.

XII.

The Evidence of Francis C. Hubner should not have been Admitted, as it Established Nothing and permitted the Jury to conjecture that there had been an Interview between the Defendant and the Assistant Attorney General for the Post Office Department relative to the Matters charged in the Indictment.

Hubner testified that on Monday, December 1st, 1902, the defendant called upon Mr. Tyner, then Assistant Attorney General for the Post Office Department, and was with

him for about half an hour. What the interview was about he does not know, as he was not present at it. There was no sign or token of any kind to indicate what, if anything, was being said or done. (Rec. pp. 183 and 184.)

The defendant cannot recollect any such occasion. (Rec. 249.)

The Government promised to connect this with the charge against the defendant, but it was never done. This call stands as an isolated fact, unexplained and therefore of possibly dire import, helping on the mysterious features of the case. The Government alleges many facts against the defendant, but it does not prove them. A call like this on Tyner, if it ever took place, admits of infinite inference. The defendant does not recollect an incident, trifling in itself, and the other party to it is dead. If the defendant did recollect it, and stated it to be of such nature as to exclude all idea of wrong, that would not preclude the Government from vast suggestions, and the jury from vast conjectures as to what transpired. The Cochran interviews signify nothing. They did not stop the fraud order, they could not, for Cochran was not the fraud order man. But Tyner, who had charge of the fraud order cases, who examined the testimony secured by the Inspectors, who considered the cases when they were made up, Tyner could tell us something, could he but revisit these glimpses of the moon. Everything which goes to make the defendant guilty *and which has not been proven*, occurred in that half hour, during that *secret interview*, whose purport we all can guess, but only two do know, and of these one will not speak and the other cannot. And crime is not to go unwhipped of justice, because it is not proven, because the defendant will not confess and the other witness is dead.

But there is absolutely no proof to support any of these vast possibilities, and the probabilities of the case are all to the contrary. The incident is brought out for the first

time on a second trial. It is not connected in the remotest degree with the subject matter of this case. There was at that time nothing in Washington concerning the Rialto Company, except the carbon jacket, which is, so to speak, a blank cartridge. It contains nothing, neither original complaints nor copies of them, but on it are simply endorsed the names of complainants and the dates when their letters were sent out to the Inspectors in Charge. This visit, if there was a visit, was on December 1st. The only complaints then existent were the original ones investigated and reported upon November 14th, and nothing new came in until more than a month after. Tyner in fact did nothing, and could do nothing, as the Inspectors had made no report. He did not direct their actions, and had he attempted it, somebody would have known it. It was not for Tyner to do anything until September 9th, 1903, and then Tyner was no more officer in the Postal Department, for Mr. C. H. Robb was then the incumbent, but there is no evidence to show that the malign influence of that possible interview on December 1st lingered about the office itself, and controlled the action of Tyner's successor, inducing him, nine months afterwards, to recommend that no fraud order issue.

XIII.

The Charge of the Court as to What Would Constitute Service by the Defendant in the Department is not Responsive to the Charge of the Indictment, and Authorizes a Conviction on Account of Matters not Alleged in the Indictment and is Erroneous in Other Respects.

The charge of the Court was:

"The questions which relate exclusively to the counts that charge the defendant with having received from the Rialto Grain and Securities Company compensa-

tion for services rendered by him to that Company in relation to the proceedings before named are these:

"Did he render any service for the Rialto Grain and Securities Company before the Post Office Department in the proceeding named? On that question I charge you that if he appeared as agent or attorney of such company before the Post Office Department, or any of its officers, charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing or obtaining action on their part favorable to such company in said proceeding, and did then by any statement or represention respecting the business in which that company was engaged, or the manner in which it was conducting such business, endeavor to obtain any action favorable to such company on the part of the Post Office Department, or any of its officers, in such fraud order proceeding, then he rendered service for said company within the meaning of the statute, and I further charge you that if he appeared as agent or attorney of such company before the Post Office Department or any of its officers charged with any duty or having any authority over such fraud order proceeding for the purpose or with the intent of influencing them in respect of their action in said proceeding, and did then arrange with the Department or any of its officers, that a hearing should be had in respect of such matters, and then also assured the Department, or any of its said officers, that it was the purpose of said company to comply strictly with the law, and then also arranged that no action should be taken against said company in said proceeding without his first being notified thereof, that would constitute service within the meaning of the statute."

The indictment charges the defendant with having rendered services:

"Consisting of his, the said Joseph Ralph Burton's appearing before the said Post Office Department and before the said Postmaster General, the Chief Post Office Inspector and the Assistant Attorney General for said Post Office Department and other officers of said

> Post Office Department as an agent of and attorney for the said corporation *and obtaining information for said corporation*, concerning said proceeding. * * * And by his influence and his presence and persuasion *inducing the said Postmaster General* to believe that said corporation was not conducting any such scheme to defraud as that last above mentioned, and to put a stop to any further investigation of the questions in this count mentioned by said Post Office Department and by said Postmaster General, and to refrain from determining the same adversely to the interests of said corporation, and from instructing said Postmaster at the said post office at St. Louis, aforesaid, to return the registered letters and other letters and matter sent by mail aforesaid, * * * and also from forbidding the payment to the said corporation by the said Postmaster at St. Louis aforesaid of postal money orders drawn to its order or in its favor." (Rec. p. 13.)

It will be observed from a reading of the indictment that the defendant was charged with actually *obtaining information* for the said corporation, and with actually *inducing* the Postmaster General to do certain specific things, and not with doing the things specified in the Court's charge.

The Court eliminates the charge as to obtaining information, in the view, obviously, that this was not rendering service.

The remaining charge of the indictment is that the defendant, by his personal presence, his official influence, his statements, representations and persuasion induced the Postmaster General to believe, etc.

This charges presence with, statements and representations to, influence upon and persuasion of the Postmaster General, individually and personally. He could not be "induced to believe" by proxy.

The Court submits, instead of this charge of the indictment, that he rendered service if he appeared before any officer charged with any duty respecting a fraud order proceeding and endeavored to obtain any action by any officer

favorable to the Company, or if he arranged with any officer of the Department that a hearing should be had.

The indictment charges appearance before a particular officer, the Postmaster General, and inducing him to believe that the Company's cause was just, and to decide favorably to it.

The instruction held that it would be sufficient if he appeared before any officer of the Department having anything to do with a fraud order, and secured or attempted to secure any action in the proceeding favorable to the Company, or even arranged for a hearing.

This presents not the case of a lesser crime within the allegations of a greater. It is the case of a trial upon a state of facts not pleaded in the indictment. Flachskann vs. United States, C. C. A. 7th Ct., 127 Fed. Rep., 674, p. 677.

That an issue not within the scope of the indictment was submitted to the jury is apparent from the opening words of the instruction: "did he render *any* service for the Rialto Grain and Securities Company," because that was not the question to be tried under the indictment.

The question was, did he render the *specific* services mentioned in the indictment.

This is violating the Fifth Article of Amendment to the Constitution in a manner which, because of its indirection, is most dangerous. The charge of the indictment is specific, and the defendant is informed by it of the nature and cause of his accusation, but upon the trial the specific charge is abandoned and a conviction permitted upon something very different, not included in, and not suggested by, the charge of the indictment.

The Charge of the Court as to what Constitutes Prohibited or Illegal Services Within the Meaning of Section 1782, is also Erroneous in the Following Particulars:

There was no evidence whatever proper or sufficient to go to the jury that the defendant appeared before the Post

Office Department as the agent or attorney of the Rialto Company for the purpose and with the intent of influencing or obtaining action on their part favorable to said company in any fraud order proceeding, or that he made any statements or representations respecting the business of that company or the manner in which it was conducted to obtain any action favorable to said company on the part of the Post Office Department in said fraud order proceeding, and with a view to preventing the issuance of such an order. The evidence of COCHRAN (pages 159, 161, 166, 168) and of BURTON (pages 235, 236), they being the only witnesses on that point, fully support the proposition that there was no proof to justify the Court in submitting any such question to the jury. Nor was there any proof to justify submitting to the jury that if the defendant as agent or attorney of the Rialto Company appeared before the Post Office Department or its officers and arranged with the department or its officers that a hearing should be had in respect of such matters, and assured the department or any of its officers of the company's purpose to comply with the law, and also arranged that no action should be taken against said company in said proceeding without his being first notified, that such acts would constitute services within the meaning of said section 1782. There was no evidence to justify any such charge. This charge authorized the jury to convict the defendant on what took place between him and Cochran at the first interview on the 20th day of November, 1902, contrary to the united and concurrent testimony both of Cochran and Burton. Not only did the Court err in giving that instruction for want of evidence to justify any such instruction, but the definition therein given of what constitutes services within the meaning of section 1782 is erroneous, and authorized a conviction for acts which the evidence shows to be innocent of any criminal complexion or character. The correct rules on this subject were expressed in instruction 1 (record page 265), instruction 2

(record page 266), and instructions 5 and 13 found on pages 266 and 267 of the record, which the Court erroneously refused to give.

The testimony shows that the defendant did not know of any fraud order inquiry; that the defendant, during the time of his employment by the Rialto Company, did not even know that any inquiry was before the department, or pending therein, as to whether the Postmaster General should issue a fraud order against the said company, and he never rendered any service having any reference whatever to the issuance of a fraud order.

It also shows that no "case" against the Rialto Grain and Securities Company was pending before the Post Office Department. If any complaint was pending there against that company, Burton did not even know of it, much less appear therein for the company.

XIV.

The Court at St. Louis had no Jurisdiction to try Counts Three and Seven of the Indictment, nor is such Jurisdiction Conferred by Section 731, Revised Statutes of 1878. The District of Columbia is not a "Judicial Circuit" or "Judicial District" within the meaning of Section 731.

Counts three and seven of the indictment charge a violation of section 1782 in that services were performed in the Post Office Department (at Washington), to prevent the issuance of "a fraud order." Section 731 of the Revised Statutes is invoked by the prosecution to sustain the jurisdiction of the "Circuit Court of the United States for the Eastern District of Missouri" for the reason, alleged in counts three and seven of the indictment that $500 of the compensation for such service was actually paid to Burton

in St. Louis March 26, 1903, and that such payment was necessary to complete the offense. It was alleged in Counts Three and Seven and assumed by the Court that the services, if any, were rendered in the District of Columbia and in the Post Office Department in said District. It is therefore contended by the Government that under section 731 Burton might be indicted, prosecuted, and punished either in the District of Columbia or in the eastern district of Missouri, and the Government, by reason of such section, had a full right to elect to present this case for indictment in that district and to try him in the city of St. Louis. We deny this right, and further deny that the District of Columbia is within any description of jurisdiction or tribunal included within the terms of section 731.

In the Revised Statutes of 1878 marginal reference is made on page 139 to section 30 of chapter 169, 14 Statutes at Large, page 484. This is the original statute from which revision was made and from which section 731 was drawn and collated. By reference to that act it will be seen it was an act to amend the existing laws relating to internal revenue and for other purposes. This particular provision of the act undoubtedly had reference, as its context shows, to conspiracies to defraud the United States in matters of revenue. The language of section 30 of chapter 169 of the Session Laws of 1867 is as follows:

> "And when any offense shall be begun in one judicial district of the United States and completed in another, such offense shall be deemed to have been committed in either of the said districts, and may be dealt with, inquired of, tried, determined and punished in either of the said districts in the same manner as if it had been actually and wholly committed therein."

By comparing this language with section 731 of the revision it will be observed that in such revision the language has been carefully and deliberately changed. The enrolled act (sec. 731) reads "judicial circuit;" and this is conclu-

sive. (*Field vs. Clark,* 143 U. S. 649.) The omission of the words "of the said district" seems to have been deliberate and purposed. By section 731 as it stands, the prerequisite to the trial in more than one jurisdiction of an accused person for any offense begun in one place and ended in another is, that such offense shall have been begun in one "judicial circuit" and completed in another "judicial circuit," and in such event only would the offense be deemed to have been committed in part in one jurisdiction and completed in another jurisdiction. The language which follows, to the effect that it may be "punished in either district," clearly does not obviate the essential requirement of the preceding clause of the statute.

A "judicial circuit" of the United States, in the language of the law and of the statutes of the United States, is as definite, well understood, and limited a term as is the term "judicial district." It must also be remembered that section 731 of the Revised Statutes is a part of the general title "The Judiciary," and is to be read in connection with the general definition and use of words under that title. The title deals with questions of jurisdiction and procedure of the Federal courts. Chapter 1 of this title number 13 relating to the judiciary deals with the subject of "judicial districts." Section 530 is as follows:

"The United States shall be divided into judicial districts as follows," and here follows a list of judicial districts established by the act. They are confined to districts in the States of the Union, and do not include in the enumeration the courts of any Territory or of the District of Columbia. This is made plain by section 569:

> "When any Territory is admitted as a State and a district court is established therein the said district court shall take cognizance of all cases which were pending and undetermined in the superior court of such Territory, etc., etc."

A "judicial circuit" of the United States, in the language

of the law and of the statutes of the United States, is as definite, well understood, and limited a term as a judicial district. There are nine judicial circuits. Under the same title number 13, "the judiciary," by section 604, judicial circuits are provided for and defined under the following heading of the chapter "JUDICIAL CIRCUITS." The language of the first paragraph of the act is as follows:

"The judicial districts of the United States are divided into nine circuits as follows:"

The first circuit including the districts of Rhode Island, Massachusetts, New Hampshire and Maine. And so the **act continues up to the provision for the ninth circuit.**

It therefore appears that by the terms of this act judicial districts and judicial circuits are clearly described and defined and distinguished. In no instance, so far as we have been able to discover in the statute, are the words "judicial district" and "judicial circuit" used convertibly and as synonymous. That the nature of the title and chapters relating to judicial districts and circuits may be made clear, we reproduce the chapter heads and text as they appear in the revision.

Revised Statutes, 1878.

TITLE XIII.

THE JUDICIARY.

CHAPTER ONE.

Judicial Districts.

"The United States shall be divided into judicial districts as follows: The States of California, Connecticut," etc. [all *States* and the District of Columbia is not among them.]

CHAPTER FIVE.

Judicial Circuits.

"The judicial districts of the United States are divided into nine circuits, as follows:"

[Here follow circuits, including districts, and the District of Columbia is not among them.]

Provisions Common to More than One Court or Judge.

[This means common to more than one of the Courts or judges dealt with in the Title XIII, which do not include courts or judges in the District of Columbia.]

> "SECTION 731. When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein."

We make, therefore, two points, both equally fatal to the jurisdiction of the court in St. Louis:

First. That the words "judicial circuit" are used by Congress advisedly and cannot, in a matter relating to life and liberty, be altered by the court for any purpose; and the District of Columbia is no part of any judicial circuit, the judicial circuits being confined to the union of districts into circuits theretofore defined, all such districts being wholly within the limits of organized States of the Union.

Second. That if it were in the power of the court to change the language of the act and to declare the legislative intention to be that the word "circuit" should read "district," it would not aid the jurisdiction, because the districts referred to in section 731 are the districts within the terms of title number 13, "THE JUDICIARY," and that section exclusively applies to districts within organized States,

and has, and can have, no reference to the jurisdiction of courts within the boundaries of the territory or of the District of Columbia.

The question thus distinctly arises on the face of Counts Three and Seven of the indictment. Two elements or ingredients are essential to constitute the offense charged against the defendant: *First*, the rendering of prohibited services in the Department; *second*, the receipt of compensation for such services. Both are essential to the completion of the offense.

Counts Three and Seven of the indictment allege that the services rendered by the defendant were so rendered in the Post Office Department of the United States, also that the $500 compensation for such services was received by the defendant at the city of St. Louis, in the eastern district of Missouri.

Section 731, R. S., was intended to meet the case where some of the acts material and essential to the crime charged in the indictment and requisite to its completion occur in one Federal jurisdiction and some of such acts in another Federal jurisdicition, and it provides that in such case the accused may be indicted, tried, and punished in either jurisdiction. It provides for no other case than the one where some of the acts essential and material to the crime and requisite to its consummation occur in one Federal jurisdiction and some in another Federal jurisdiction. The indictment shows on its face that the services alleged to have been rendered by the defendant which are essential to the consummation of the offense were rendered in the city of Washington, in the District of Columbia, and that the compensation alleged therefor, which is also essential to the completion of the offense, was received by the defendant in the city of St. Louis.

The Sixth Amendment of the Constitution of the United States provides as follows:

> "In all criminal prosecutions the accused shall be entitled to a speedy and public trial by an impartial jury

of the *State and district* wherein the crime shall have been committed, which district shall have been previously ascertained by law."

This makes more definite the provision in article 3, section 2, of the Constitution, which ordains that the trial "*shall* be held in the *State* where the crime was committed." The Constitution in this Sixth Amendment states that the trial must be in the State and district where the crime has been committed—that is to say, in all cases the trial must be within the limits of a State, and if a State has more than one judicial district the trial must be in that district of the State in which the crime was committed.

At common law and under the Constitution of the United States, and in the absence of statute where a crime consists of two acts, one done in one jurisdiction and another in another jurisdiction, no prosecution can be had in either.

Therefore, in the absence of statute so providing, Senator Burton could not be tried in St. Louis for the offense alleged in Counts Three and Seven of the indictment. There is no statute which provides for the case.

The words "judicial district" as used all through Title XIII, "The Judiciary," never include the District of Columbia or the Territories. On the contrary, whenever this Title XIII has any provision in respect of the District of Columbia it mentions the District of Columbia by name, as, for example, in section 705, when it provides that "final judgment or decree by the supreme court of the District of Columbia," etc., may be reviewed by the Supreme Court of the United States, and also in section 811, where there is a provision as to grand juries in the "District of Columbia," the language being "the *circuit* and *district* courts, and the district courts of the *Territories*, and the supreme court of *the District of Columbia* may discharge their grand jurors," etc. So also the provision in section 871 and section 874 providing for depositions in the "District of Columbia" in suits pending elsewhere.

So also this Title XIII, when it refers to a Territory or to

the courts of a Territory, mentions the Territory or the courts of the Territory by that name.

The Revised Statutes do not deal generally with the Territories, or with the courts of Territories, or with the District of Columbia, or the Courts of the District of Columbia under this Title XIII, "The Judiciary."

Section 731, R. S., which is itself in Title XIII, reads "judicial circuit," which means only "judicial circuits" defined in Title XIII, composed of the "judicial districts" defined in Title XIII, in the organized States.

The revisers in 1878 must be presumed (nothing appearing to the contrary) to use the words "judicial circuit" or "district" as they had defined them in Title XIII, and they there limited them to judicial circuits and districts in the several States of the Union, and the words do not include any judicial district, much less any judicial circuit in the Territories or in the District of Columbia.

If this section 731 were to be construed as meaning anything else, it would be contrary to article 3, section 2, of the Constitution of the United States and contrary to the Sixth Amendment.

Suppose a man commmited a crime consisting of two parts, one in the State of Colorado and the other in the Territory of New Mexico, both parts being essential to the existence of the offense. The offender could not be punished in any court of the Territory of New Mexico for that part of the offense which was committed in the State of Colorado for the reason that article 3, section 2, and the Sixth Amendment of the Constitution of the United States provide that the trial of the crime *shall* take place in the *State and district* in which the offense was committed, and, in the case stated of an attempt to try such a crime in New Mexico for an offense committed in Colorado, the crime would not be tried in the *State* and district in which it was committed.

The same principle applies to a crime consisting of two parts, one part committed in a State and one part in the District of Columbia.

As to an offense committed, one part in a State and one part in a Territory, it cannot be held that section 731 would authorize the trial of such crime in a State on the theory that that part of the statute which undertakes to authorize the trial in a Territory (if such construction were to be placed upon it) could be stricken out as separable, and thus leave the statute to stand as a valid statute authorizing the trial in a State, for the words which it would be necessary to strike out are not separable from the rest of the statute. On the contrary, if the words which (on such a construction) undertake to make the offense triable in a Territory be stricken out, the operative part of the statute is stricken out and nothing remains under which the offense could be tried in the State. These words are, "it shall be deemed to have been committed in either and may be dealt with, inquired into and determined and punished in either."

The statute does not read that the offense shall be deemed to have been committed in the State, and that it may be punished in the State, but that it shall be deemed to have been committed in "*either* (State or Territory).

We therefore maintain that whether section 731 be construed as it now reads, "judicial circuits," or whether it shall read "judicial districts," it could not give and did not give to the Circuit Court of the United States for the Eastern District of Missouri any jurisdiction to try the offense alleged in Counts Three and Seven of the indictment; for in either event the alleged offense was not begun in one "judicial circuit" or in one "judicial district" within the meaning of section 731, and completed in the Eastern District of Missouri, and therefore section 731 in any view has no application to the case.

This question arises on the face of the indictment which

is a part of the common law record and is reviewable on a writ of error. The question also arises on the motion made by defendant at the end of the Government's testimony for a direction of a verdict of not guilty, and also on a similar motion made by defendant at the close of all the testimony, and also on the final judgment.

IN CONCLUSION.

It is not difficult, viewing the conduct of men with suspicion, to discover in everything they do a bad motive and a bad purpose. In our judgment of men the conclusion we reach depends upon the presumption we indulge. The same acts are taken by one to prove guilt and by another to prove innocence, and they may be consistent with either. But our law declares as a rule, not of mercy, but of absolute justice, that a man charged with wrong must be presumed to be innocent, and that his acts consistent with innocence shall not be taken as evidence of guilt, simply because also consistent therewith. We ask for the defendant in the consideration of this case, this measure of justice, and no more.

He was a Senator of the United States, and he was a poor man. He desired to supplement his official salary by the earnings of his professional labor. This he might lawfully and rightfully do.

An opportunity presented itself in the case of the Rialto Company. He was called upon to assist in the defense of its President, who was involved in trouble, as he insisted, through the machinations of others. It was desired also that he should assist in starting the Company in a new line of business, which was entirely legitimate and proper.

There is no function of the lawyer more honorable than the defense of persons charged with crime. It is imposed upon him as a sacred duty by his oath, it is secured as a right of every citizen, the highest as well as the humblest, by the Constitution of the Nation and of every State. To guide, counsel and direct a client in his business affairs within the law of the land is the absolute right of the lawyer, if not so high a duty as the defense of persons charged with crime.

The employment of the defendant by the Rialto Company

was ostensibly at least, for these purposes. And nothing existed at that time to suggest any sinister reasons for his employment. Dennis was a man in good standing, prominently engaged in a reputable business, aside from his connection with the Rialto Company. He was, if not wealthy, at least well to do, and not likely, therefore, to hazard the loss of his fortune in an illegal venture which could have but a short course to run, and must end in disaster. The Rialto Company itself had been newly organized, and was being advised in the general conduct of its business by reputable members of the St. Louis bar. That its business was of a speculative character is true, but so is an enormous volume of the business of the country. We may approve or disapprove of the Stock Exchanges and the Boards of Trade, but they are with us as business institutions, adjudged to be legal, and they invite and incite to participation in their operations. At this time the Rialto Company could and did refer as to its credit and standing to commercial agencies, to banks, and to Trust Companies.

When the defendant agreed to serve this Company, he knew and could know only what thus appeared upon the surface, and this was presented to him in its best aspect.

The apprehended indictment of Dennis, explained to be due to the conduct by others of the Brooks Brokerage Company's business, could not speak the condemnation of the Rialto Company. It would suggest very naturally to the defendant, when he went to inquire whether the Department intended to press the case against Dennis, to inquire also whether there were any complaints against the Rialto Company, and it was just as natural that he should explain the fact that he inquired. He was the counsel of the company and was advised that it was doing a legitimate business, but if it was to become involved with the Post Office Department, he, being a Senator, would have nothing to do with it—not simply in the Department, but neither in the

Department nor out of it. This is the only intelligible explanation of what he said as to his position.

That he would like to be informed, in so far as it was proper to inform him, if troubles arose, was a necessary and proper incident of his position. If there was to be trouble, he wished to know it, and sever his relations with the Company. He was assured that the usage was to give notice and to allow a hearing in such cases, and with this he was content. He asked for nothing more.

Advised from St. Louis that the complaints of which he had learned from Cochran had been investigated and found unwarranted, he never again inquired of Cochran, even as to the existence of complaints, and never was informed of any. He did inquire of Cochran whether two men who, he had been told, were falsely representing themselves to be Inspectors, were such and ascertained that they were not. As emphasizing his answer, Cochran may well have said that these men had not been sent out, and that nobody had been sent out to investigate the Company, because there was nothing in the Department against it. This was true. No complaints had been made since those which had been sent out early in November.

The defendant never made inquiry concerning the Rialto Company, aside from Cochran, unless he made it on December 1st of General Tyner. Of this there is no evidence. There was nothing before Tyner. He has never spoken a word. The defendant denies any such interview with him, and we must either accept that denial or else do what has no warrant in reason, law or justice, reject that denial, and conjecture that the defendant arranged with Tyner to prevent the issuance of a fraud order.

Everything done by the defendant in the Department was done as an incident of the Dennis case. But relations are reversed, and it is assumed against the defendant that the Dennis case was but an incident of what was done in the

Department. The indictment against Dennis is said to have been a trivial matter, and to have served as a mere pretext for the employment of the defendant for his influence in the Department. And yet that indictment crushed Dennis and killed him. The significance of that indictment in this case is determinable not by what others may now assume to think of it, but by what Dennis then did think of it.

The agreement between the defendant and the Rialto Company, according to its terms as stated by Harlan and the defendant, who alone knew what its terms were, was a fair and lawful one, and it must be presumed to have been intended as such, unless there is something in the evidence to impeach the good faith of the parties. This is sought to be accomplished by evidence of what Burton did under the agreement. His services in connection with the indictment and the securities business, the latter not carried far because of Dennis' collapse in body and mind, are all ignored, and what was said casually upon one or two occasions in the Department is insisted upon as the whole of the defendant's service under the agreement.

The Rialto Company, it is said, was a bad concern, complaints of fraud were made against it to the Department, a fraud order should have been issued against it, and would have been but the defendant prevented it. This is the charge of the indictment against the defendant plainly stated, this is the accusation affirmed by the verdict, this is the offense for which sentence was imposed, and, if the conviction in this case stands, this is the crime, the shame and reproach of which the defendant must bear to the grave.

What is the truth as to all this? The Rialto Company was an institution of fair seeming, and, with one exception, occurring long after the defendant was out of all relations with it, was pronounced by the Government, when it had learned the whole truth respecting it, to be "fairly honest." But whether it was so or not was by the Court held to be

immaterial, and so can prove nothing. Complaints were made, and all the defendant did was to ascertain that fact, and before he had done this, the complaints had been investigated and disregarded. Other complaints were made, but the defendant was not advised of them. He never pretended to have knowledge of the merits of any complaint, he never discussed one with any official. During the entire time that is to be considered, nobody in the Department proposed a fraud order, and the defendant neither did nor had occasion to speak against the issuance of one. More than this, nobody in the Department, save the Chief Clerk of the Bureau of Inspection and the Inspectors at St. Louis, knew anything whatever of any complaints against the Rialto Company. In a mechanical way, following the usage of years, the letters that came in were referred from one functionary to another until they came to the man in the field, and he, the only person called upon to consider or to act, saw nothing in them until after June 17th, 1903, when Burton had passed from the stage, that required action of any kind. He called in an associate, and whatever we may say in a technical sense, now for the first time was anything done or proposed to be done, and now was the time for the defendant to interfere, if his interference was ever desired, or was to accomplish anything. The investigation was begun July 27th, and ended August 20th, 1903. It was apparently thorough and was conducted under the legal guidance of the District Attorney, D. P. Dyer. When it was closed, and the whole truth made known, when the "fairly honest" management of Dennis, and the fairly dishonest management of Mahaney and McRae were revealed, the Inspectors, upon the advice of the District Attorney, recommended that no fraud order be issued, and when the report of these same Inspectors, showing all the facts, together with the recommendation, came before the Hon. C. H. Robb, then Assistant Attorney General for the Post Office Department, he accepted that recommendation, and closed the case.

Unless there has been an offense, there can be no offender. In every criminal case, the first inquiry should be, not is the defendant guilty, but has a crime been committed? In the present case, if we first inquire whether a crime has been committed, we will get no farther. Everything done respecting the complaints against the Rialto Company was done under the rules and regulations of the Post Office Department by the proper officials and in the manner prescribed, without let or hindrance from any one. All letters came in the first instance to Taylor, and he passed them on to Smith. Nobody sought to prevent him. Smith passed them on to Dice. Nobody sought to prevent him. Dice passed them on to Price. Nobody sought to prevent him. Price investigated the first complaints, and reported them unfounded. Nobody influenced or sought to influence him to this. Later complaints were investigated by him and reported upon as affording a possible basis for prosecution, but none for a fraud order. In this he was influenced only by the District Attorney, whose advice and guidance he very properly followed. This report upon the later complaints came before the Assistant Attorney General for the Post Office Department, and he approved it. Nobody persuaded him to this or sought to do so. Thus, as we follow the so-called proceeding against the Rialto Company, step by step, from its beginning to its close, we find everything done according to rule, and no interference from the outside and none attempted. There was absolutely no offense. And yet the defendant stands convicted as an offender. We appeal against the injustice of a sentence which imposes upon the defendant the shame and punishment of a crime which has not been committed.

JOHN F. DILLON,
HARRY HUBBARD,
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For Plaintiff in Error.

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APPENDIX.

CONSTITUTION OF THE UNITED STATES.

"ARTICLE III, SECTION 2. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as Congress may by law have directed."

Fifth Amendment to the Constitution.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Privileges of Congress and Members.

The Constitution of the United States provides, as respects the privilege of Congress, *inter alia*, as follows:

"They (the Senators and Representatives) shall in

all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same."

Const., Art. I, Sec. 6.

STATUTORY PROVISIONS.

Revised Statutes United States.

"SECTION 731. When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein."

Section 1782 is the one on which the indictment is founded, and is as follows:

"SECTION 1782. No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself, or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martia[1], Bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust or profit under the government of the United States."

Section 5480 of the R. S., is as follows:

"SEC. 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or to

sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation, or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle,' or 'counterfeit money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' 'spurious Treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any post office, branch post office, or street or hotel letter box of the United States, to be sent or delivered by the said post office establishment, or shall take or receive any such therefrom, such person so misusing the post office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than egihteen months, or by both such punishments, at the discretion of the court."

Sections 3929 and 4041 of the R. S., which confer authority upon the Postmaster General respecting fraud orders, are as follows:

"SEC. 3929. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing of

any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, instruct postmasters at any post office at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Post Master General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme or device, that remittances for the same may be made by registered letters to any other person, firm, bank, corporation or association named therein shall be held to be *prima facie* evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

"SEC. 4041. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an

individual or as a firm, bank, corporation or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders.

"But this shall not authorize any person to open any letter not addressed to himself.

"The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme or device, that remittances for the same may be made by means of postal money-orders to any other person, firm, bank, corporation or association named therein shall be held to be *prima facie* evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way."

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 539.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

SEPARATE BRIEF OF PLAINTIFF IN ERROR ON THE CONSTITUTIONALITY OF ACT OF 1864.

The Act of 1864, Rev. St., Sec. 1782, under Which the Indictment was Found, is Unconstitutional.

For the convenience of the Court in its consideration, and because of the gravity and importance of argument to follow, we have embodied it in a separate brief.

ARGUMENT AND BRIEF.

The act of 1864, now Rev. St. Sec. 1782, is in conflict with the fundamental idea on which our whole federal government is founded, viz: that the federal government is a government of limited powers, with duties defined and restrictions imposed, and no authority is lodged anywhere to

change those duties or restrictions, except the power reserved by the people.

The framers of our government, in order to prevent the concentration of power into the hands of one man or one body of men, created three departments,—not necessarily to work in harmony together, but each to act wholly independent of the other. It was the intention, as shown by the debates in the constitutional convention and the Constitution itself, to establish an impassable gulf separating these three great departments of the federal government. One department shall not encroach upon or in any way coerce the other. To that end there should be no blending of governmental functions, except where it was absolutely necessary, and then the Constitution clearly and zealously guarded the independence of each department, thus emphasizing the basic principle that the great powers of government were so eternally separated each from the other that there could be no conflict between them. The legislature should make, the judiciary interpret, and the executive should administer, the laws.

And just here it is necessary to observe the line of demarcation between the official and the citizen, and the no less clearly defined distinction between the constitutional official and the official that is created by legislative enactment.

The President, the members of Congress, and the Judges of the Supreme Court are the only officers of the federal constitution. All other officers of those several departments are creatures of the legislature, or what this Court has styled congressional officers, as distinguished from constitutional officers. The office of the legislative official may be enlarged, modified or abolished by Congress. This is not true of a constitutional office. It is permanent, fixed, and above and beyond the control of Congress. It is also above and beyond the power of the executive or the judicial departments. It gets its life from and can only be changed by the Constitution.

Every citizen, be he official or in private station, is alike

amenable to the law, but the constitutional official, acting as an official, cannot be called to an account, or punished for any official act, except in the mode as defined and prescribed in the Constitution creating him. The recognition of this principle is absolutely necessary to protect him in his independence as an official, and to protect the great constitutional bodies in their independence.

The Constitution defines just how the President, a member of this Court, and a member of Congress can be punished for any official misconduct, and by such constitutional provisions limits the manner of punishment; and Congress has no power to add to or take from the express provisions so made for that purpose. The denial of this proposition would place it in the power of Congress to destroy the independence of each department, and nullify the Constitution, and that is just the effect of the law under which this prosecution is brought.

The President may be impeached for "treason, bribery, or other high crimes and misdemeanors," and he cannot be punished in any other way than as prescribed by the Constitution. A member of this Court can be proceeded against in the same manner and in no other way. A member of Congress may be punished in such manner as each House may determine as to its "own members," and the right to expel extends to all cases where the offense is such as, in the judgment of "each House," is inconsistent with the trust and duty of "its *own* members."

It would certainly be an anomaly in a constitutional government, with three co-ordinate branches of such government, as created by the federal constitution, if the legislative branch, under whatever pretext, could enact a law making any act of the President, or any act of a Justice of the Supreme Court, a misdemeanor, and delegate the jurisdiction and power to an inferior judicial tribunal to try the President, or a Justice of this Court, for a violation of such law, and subject him to fine, imprisonment and removal from

office as the result of a verdict of a jury. The mere statement of the proposition would seem to be sufficient to condemn it as absurd, and the shield of the Constitution is no greater protection for the President,—for the Justice of the Supreme Court,—than for the Senator,—each and all of whom are created by the Constitution.

"The Government of the United States is one of *enumerated* powers,—The National Constitution being the instrument which specifies them,—and in which authority should be found for the exercise of any power which the National Government assumes to possess. In this respect it differs from the Constitutions of the several States which are not grants of powers to the States, but which apportion and impose restrictions upon the powers which the States inherently possess" (Cooley Const. Lim., 7th ed., p. 11).

In the case of Martin *vs.* Hunter, Lessees, 1 Wheat., 304, 343, Chief Justice Marshall, speaking for the Court, among other things, said:

"The Government of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."

In the case of Ableman *vs.* Booth, 21 How. (U. S.), 519, it was said, by Chief Justice Taney, that:

"The same purposes are clearly indicated by the different language employed when conferring supremacy upon the laws of the United States, and jurisdiction upon its courts. In the first case it provides that: 'this Constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land, and obligatory upon the judges in every state.' The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land; nor were the judges bound to carry it into effect."

In the case of *Ex Parte* Virginia, 100 U. S., 361, in discussing the Constitution and amendments, the Court said:

"The provision authorizing Congress to enforce them, by appropriate legislation, does not enlarge their scope, nor confer any authority which would not have existed independently of it. No legislation would be appropriate which should contravene the express prohibitions upon Congress previously existing, as, for instance, that it should not pass a Bill of Attainder, or an *ex post facto law. Nor would legislation be appropriate which should conflict with the implied prohibitions upon Congress.* They are as obligatory as the express prohibitions."

It was said by Mr. Justice Miller, speaking for the Court in the case of Kilbourn *vs.* Thompson, 103 U. S., 182, that:

"The powers of Congress itself, *when acting through the concurrence of both branches, are dependent solely on the Constitution.* Such as are not conferred by that instrument, either expressly or by fair implication *from what is granted,* are 'reserved to the states respectively, or to the people.' "

It is provided in Section 3, Article 1, Constitution of the United States, that:

"The senate of the United States shall be composed of two senators from each state, chosen by the legislature, for six years."

A senator is therefore a constitutional officer. And it is further provided that:

"No person shall be a senator who shall not have attained the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state from which he shall be chosen."

A person possessing these qualifications is eligible to the office of United States Senator, unless he comes within the disqualifications provided by section three of the Fourteenth

Amendment to the Constitution of the United States,—which reads as follows:

"No person shall be a senator or representative in congress, or elector of President or Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability."

The Constitution, by Section 6, Article 1, provides what he shall not do during the time for which he was elected, viz:

"No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during such time."

Has Congress the constitutional power to superadd qualifications and disqualifications to those prescribed by the Constitution of the United States, which created the office of United States Senators?

By Section 1, Article 2, Constitution of the United States, it is provided that: "No Senator * * * shall be appointed an elector." And it is provided by Section 4, Article 1, that:

"The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislatures thereof; but Congress may at any time, by law, make or alter such regulations, *except as to the places of choosing senators.*"

By the tenth amendment to the Constitution it is provided that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The Constitution, in no uncertain language, has fixed the qualifications of the Senators, and the disqualifications, "during the time for which he was elected." But for the Act of 1864, a citizen holding the office of United States Senator, under the Federal Constitution, had the right "to receive, and agree to receive," compensation for "services rendered or to be rendered to any person," in any matter pending before "any department, court-martial, bureau, office, or any civil, military or naval commission whatever," of the Federal Government, the same as any other citizen. It does not follow, however, that he could not be punished for such acts, even if there had been no statute on the subject. The power to punish a Senator has been expressly conferred by the Constitution, and the mode and procedure fixed and designated by Section 5, Article 1, of the Constitution, which reads:

"*Each* house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as *each* house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, *with the concurrence of two-thirds, expel a member.*"

In the case of Kilbourn *vs.* Thompson, 103 U. S., 182, it was said that:

"Of course neither branch of Congress, when acting separately, can lawfully exercise more power than is con-

ferred by the Constitution on the whole body, except in the few instances where authority is conferred on either House separately, as in the case of impeachment. No general power of inflicting punishment by the Congress of the United States is found in that instrument. * * * *That instrument, however, is not wholly silent as to the authority of the separate branches of Congress to inflict punishment.* It authorizes each House to punish its own members. By the second clause of the fifth section of the first article, 'each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member'; and, by the clause immediately preceding it, 'may be authorized to compel the attendance of absent members, and in such manner and under such penalties as *each* House may provide.' These provisions are equally instructive in what they authorize, and in what they do not authorize."

And again, on page 189, it is said that:

"As we have already said, the Constitution expressly empowers each house to punish its own members for disorderly behavior. We see no reason to doubt that *this punishment may, in a proper case, be imprisonment,* and it may be for refusal to obey some rule on that subject made by the House for the preservation of order."

Under the authority thus expressly conferred, the Senate had the undoubted power to adopt a rule that "No Senator, after his election, and during his continuance in office, shall receive, or agree to receive, any compensation whatever, directly or indirectly, for any service rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, bureau, officer, or any civil, military or naval commission whatever;" and, to make such a rule effective, would not require the concurrence of the House of Representatives.

This proposition is not only settled by the decision of this Court, cited *supra,* but it has a strong precedent in its support. In 1 Vol. Story on Const., 589 (4th ed.), it is stated:

"In July, 1797, William Blount was expelled from the Senate for 'a high crime and misdemeanor, entirely inconsistent with his public trust and duty as a Senator.' The offense charged against him was an attempt to seduce an American agent among the Indians from his duty, and to alienate the affections and confidence of the Indians from the public authorities of the United States, and a negotiation for services in behalf of the British Government among the Indians. *It was not a statutable offense; nor was it committed during the session of Congress; nor at the seat of Government.* Yet, by an almost unanimous vote, he was expelled from that body; and he was afterwards impeached (as has already been stated) for this, among other charges. It seems, therefore, to be settled by the Senate, upon full deliberation, that expulsion may be for any misdemeanor which, *though not punishable by any statute,* is inconsistent with the trust and duty of a Senator."

"In the case of John Smith (a Senator), in April, 1808, the charge against him was for participation in the supposed treasonable conspiracy of Colonel Burr. But the motion to expel him was lost by a want of the constitutional majority of two-thirds of the members of the Senate. The precise grounds of the failure of the motion does not appear; but it may be gathered from the arguments of his counsel that it did not turn upon any doubt that the power of the Senate extended to cases of misdemeanor not done in the presence or view of the body; but most probably it was decided upon some doubt as to the facts. It may be thought difficult to draw a clear line of distinction between the right to inflict the punishment of expulsion and any other punishment upon a member, founded on the time, place or nature of the offense. The power to expel a member is not, in the British House of Commons, confined to offenses committed by the party as a member, or during the session of Parliament; but it extends to all cases where the offense is such as, in the judgment of the House, unfits him for parliamentary duties."

It will therefore be seen that, by the Constitution, there has been delegated express power to each House to punish its own members, in such manner as, in its wisdom, is just and proper, and, by "the concurrence of two-thirds, may expel a member."

Mr. Cooley, in his work on Constitutional Limitations (7th ed.), page 99, says:

"When the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases. On this ground it has been held by the Supreme Court of Maryland that where the Constitution defines the qualification of an officer, it is not in the power of the legislature to change or superadd to them, unless the power to do so is expressly, or by necessary implication, conferred by the Constitution itself."

And this proposition laid down by Mr. Cooley seems to be well supported by unquestioned authority.

In the case of Lowe *vs.* Commonwealth, 3 Met. (Ky.), 241, almost the identical question is decided. The court said:

"But the question yet remains to be decided whether the legislature can prescribe any other mode of removing such officer from office than those furnished by the Constitution or enact a law whereby such officers may be suspended from a performance of their respective duties, and deprived of the emoluments of the same,—which suspension, so far as the officer is concerned, would certainly be tantamount to a removal.

It seems to us that there can be but one view of this question, which is that wherever the Constitution has created an office and fixed its term, and has also declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration of his term, it is beyond the power of the legislature to remove such officer, or suspend him from office for any reason, or in any other mode than the Constitution itself has furnished.

To recognize the existence of such a power would be, in

effect, to say that these provisions of the organic law of the land are subject to legislative caprice, and, to that extent, to defeat and violate the restrictions and safeguards which were inserted in the Constitution, in order to give it permanence and stability. The result of such a doctrine might be pernicious in the extreme.

The Governor's term of office is fixed by the Constitution. That instrument likewise provides how he may be impeached and removed, and declares that all impeachments shall be tried by the Senate. Would it be seriously contended that the legislature could, by enactment, subject him to trial for official misconduct, in any other mode,—as by indictment or presentment in a circuit court,—and declare that, upon conviction thus had, his office should be deemed vacant, or that he should be suspended from a discharge of his official duties? And yet such legislation would be valid if that department of the Government can, at its option, change the provisions of the Constitution in reference to the mode of proceeding against the Governor, or any officer whose office is created by that instrument. Or suppose the legislature should attempt, by enactment, to empower the court, whenever in its judgment the public interest demanded it, to suspend any State officer whose term of office is fixed by the Constitution, and who is subject to impeachment from the performance of his official duties for such period as the court might deem proper,—would such enactment be regarded as constitutional? Most certainly not. And yet the reverse would be true if the power in question really existed.

In our opinion, the fact that the framers of Constitution inserted in that instrument the several provisions fixing the terms of the offices thereby created, and prescribing the grounds upon which and the modes whereby the incumbent of such offices may be removed, is altogether sufficient to warrant the conclusion that those subjects were fully considered by them, and that they intended, by embodying such provisions in the Constitution, to make them permanent, and fixed, and thus to place the subjects to which they relate altogether beyond legislative control."

In the recent case of Falloon *vs.* Clark, 61 Kas., 127, the question was before the supreme court of Kansas as to whether or not the legislature could provide for a different

mode for the suspension or removal of a constitutional officer in any other mode or manner than that provided by the constitution, and the court said that

"The constitution having prescribed the grounds for which a judge may be removed and the manner in which it may be done, is it competent for the legislature to provide that he may be removed for other reasons and in another manner?"

The court thereupon approves the case of Lowe *vs.* Com., 3 Metc., 237, and says:

"In Throop on Public Officers, sec 341, it is said to be well settled that where the constitution creates or recognizes an office, and declares that the incumbent may be removed *in a specified manner,* or for specified reasons, the legislature cannot constitutionally provide by statute for his removal for any other reason or in any other manner."

And the court further says, on page 128, that

"Where the constitution plainly prescribes the grounds and method of removal it must be regarded as the paramount law, and not subject to be directly or indirectly changed or nullified by legislative enactment."

The same question was before the Supreme Court of Kentucky in the case of Brown *vs.* Grover, 6 Bush (Ky.), 3, in which it was said that:

"The Constitution of the State has designated the causes for which sheriffs may be removed from office, and the mode in which it is to be done; consequently the legislature had no power to add other causes of removal, and prescribe other or different modes."

The Supreme Court of Maryland, in the case of Thomas *vs.* Owens, 4 Md., 190, said:

"Where the Constitution defines the qualifications of an officer, it is not within the power of the legislature to change or superadd to it, unless the power is expressly or by necessary implication given to it."

The question was again before the Supreme Court of Kentucky, in the case of Commonwealth *vs.* Williams, 79 Ky., 42-44, in which the court, among other things, said:

"The Constitution has designated the offenses for which certain public officers, including county judges, may be removed from office, and the legislature has no power to prescribe removal from office as a penalty for offenses not so designated. Nor can it, by declaring that a given offense shall be deemed one of a class of offenses for which an officer may be removed, make it of that class, and authorize the removal of an officer upon his conviction of such offense."

And this principle, so fundamental in our theory of government, was emphasized by the Supreme Court of California in the case of Sheehan *vs.* Scott, 145 Cal., 684, in which the Court said that:

"The Constitution of the state is not a grant of power, and the legislative power which is vested in the senate and assembly includes all the power not expressly prohibited to the legislature or elsewhere conferred. Though the legislature cannot increase or diminish the qualifications which the Constitution has prescribed for eligibility to the offices created by that instrument, nevertheless, for all offices which the legislature may authorize or establish, it may prescribe such qualifications as, in its judgment, will best accord with the public policy, or subserve the interests of those affected thereby."

And the Court, in the opinion, (p. 687) further said:

"It may be admitted that the legislature can neither increase nor diminish the qualifications which the Constitution has prescribed for eligibility to any of the offices created by that instrument."

The decisions cited *supra* were based upon a construction of state constitutions, which are not grants of power, like the Federal Constitution. It is fundamental that a state constitution is not a grant of "special, limited and *enumerated* powers," implying a negative of all others, as is the case with the Constitution of the United States. "The legislative

authority of a state is the right to exercise supreme and sovereign power, subject to no restrictions except those imposed by its own constitution, the Constitution of the United States of America, and by the laws and treaties made under it." This being the conceded rule, it is most pertinent here to ask what article—what section—what clause of the Federal Constitution, expressly or by necessary implication, empowered Congress to enact the statute of 1864, under which the indictment was found in the court below?

The Constitution will be searched in vain to find the power conferred upon Congress, expressly or by implication, to delegate to the Judiciary the power, by indictment or otherwise, to remove from office a United States Senator, or forever disqualify him from thereafter holding any office of honor or trust under the Constitution and laws of the United States.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." (Art. 10, Amendts. to Constitution.)

By analogy, the case of Morris *vs.* Powell, 125 Ind., 287, is directly in point. In that case the court had under consideration the validity of a statute affixing other qualifications to an elector than those prescribed by the Constitution, and said: (p. 60.)

"The legislature has no such power. That when the people, by the adoption of the Constitution, have fixed and defined in the Constitution itself what qualifications a voter shall possess to entitle him to vote, the legislature cannot add an additional qualification, is too plain and well recognized for argument, or to need the citation of authorities. The principle is elementary that when the Constitution defines the qualifications of voters, that qualification cannot be added to or changed by legislative enactment."

Rison *vs.* Farr, 24 Ark., 161.

The Supreme Court of Pennsylvania, in the case of McAfferty *vs.* Guyer, 58 Pa. St., 109, said:

"A right conferred by the Constitution is beyond the reach of legislative interference. If it were not so, there would be nothing stable; there would be no security for any right. It is in the nature of a constitutional grant of power or privileges that it cannot be taken away by any authority known to government. It involves a prohibition of interference with it."

The Act of 1864 superadds disqualifications to those expressly contained in the Constitution, and prescribes a mode of procedure and a punishment not expressly authorized by the Constitution, or conferred by necessary implication. Indeed, the express power conferred is an implied prohibition against the exercise by Congress of that most extraordinary legislation,—the basis of this prosecution.

No legislation is "appropriate which should conflict with the implied prohibitions upon Congress. *They are as obligatory as the express prohibitions.*" (*Ex parte* Virginia, 100 U. S., 361).

When Senator Burton was chosen by the State of Kansas to represent it in the Senate of the United States, he was chosen for six years. He had all of the qualifications prescribed by the Federal Constitution. He was, and in the nature of things, only required to consult the organic laws as to his duties and obligations as a Senator. He had the constitutional right to hold the office for six years, subject only to the delegated, enumerated and express power of the Senate to expel him, and subject to the disqualifications provided in Section 6, Article 2, of the Constitution, that "no Senator * * * shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased during such time."

The Act of 1864 applies only to the conduct or action of

the Senator, as contradistinguished from the conduct or action of the citizen. It is a limitation and restriction upon the conduct and action of the Senator during his term of office, nowhere in the Constitution, expressly or by necessary implication, conferred upon Congress to create. The Senate, by and through the power delegated to it by the Constitution, might properly expel for doing of the things charged in the indictment, as a violation of senatorial dignity, but had Congress the power, by enactment, to make such acts and conduct of the *Senator* a crime, and delegate to the Judiciary the power to take from the *Senator* the rights and privileges guaranteed by the Constitution? The judgment of conviction not only imprisons him, but disqualifies him from holding the office for which he was chosen by the State of Kansas, for "six years."

Evidently Congress submitted to the people, for ratification, the Fourteenth Amendment, upon the theory that it had no constitutional power, by legislative enactment, to add to the disqualifications of the Senator. It is provided by Section 3, of the Fourteenth Amendment, that:

"No person shall be a Senator or Representative in Congress, or elector of President or Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability."

If such a restriction incorporated in a Statute would have been unconstitutional and void, as not being one of the *enumerated* powers of the Constitution, then most clearly the Act of 1864 was not within the purview of the Constitution of the United States.

In the case of U. S. *vs.* Harris, 106 U. S., 636, this Court

approved the language of Mr. Justice Story in his commentaries on the Constitution,—in which he said:

"Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power, and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it."

The framers of the Constitution were most careful to prescribe the powers of "each House," and the debates in the Constitutional Convention demonstrate that it was the purpose of the great men who participated in those debates to so form and frame and fashion that great instrument that neither House would have the power to trench upon the prerogative of the other. Therefore it was provided (Section 5, Article 1) that:

"*Each House* shall be the judge of the elections, returns and qualifications of its *own* members; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as *each* House may provide.

Each House may determine the rules of *its* proceedings, punish *its* members for disorderly behavior, and, with the concurrence of two-thirds, expel a member."

As was said in 1 Story on Constitution, Sec. 833, p. 584:

"It is obvious that a power must be lodged somewhere to judge of the elections, returns and qualifications of the members of *each* House composing the legislature; for otherwise there could be no certainty as to who were legitimately chosen members, and any intruder or usurper might claim a seat, and thus trample upon the rights and privileges and liberties of the people. Indeed, elections would become, under such circumstances, a mere mockery, and legislation the exercise of sovereignty by any self-constituted body. *The only possible question on such a subject is as to the body*

in which such a power should be lodged. If lodged in any other than the legislative body itself, its independence—its purity—and even its existence and action may be destroyed or put into imminent danger. No other body but itself can have the same motive to preserve and perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own characters, and to preserve the rights and sustain the free choice of its constituents. Accordingly, the power has always been lodged in the legislative body by the uniform practice of England and America."

In 1 Kent's Comm., 235, the learned author says, in discussing the Constitution of the United States:

"*Each* House is made the sole judge of the election and qualifications of its members. The same power is vested in the British House of Commons, and the legislatures of the several States; and *there is no other body known to the Constitution, to which such a power might safely be trusted;* * * * and as *each* House acts in these cases in a judicial character, its decisions, like the decisions of any other court of justice, ought to be regulated by known principles of law, and strictly adhered to, for the sake of uniformity and certainty."

People *vs.* Hall, 80 N. Y., 121.

By Article 6 of the Constitution, it is provided that:

"This Constitution and the laws of the United States which *shall be made in pursuance thereof,* * * * *shall be the supreme law of the land,"* etc.

In speaking of this clause, and the foresight which marks every clause of the instrument, Chief Justice Taney said: (21 How., 519).

"The sovereignty to be created was to be limited in its powers of legislation, and *if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land; nor were the State judges bound to carry it into effect."*

If the act of 1864, under which the indictment was found, is to be regarded as the "supreme law of the land," what becomes of Section 5, Article 1, of the Constitution,—that "*each* House shall be the judge of * * * the qualifications of its *own* members"? It is utterly impossible to give force and effect to the plain meaning of this section, and at the same time force and effect to the act of 1864, as "the supreme law of the land."

Senator Burton has been convicted of a violation of this act, and fined and sentenced to imprisonment, and, by the judgment of the court, "rendered forever hereafter incapable of holding any office of honor, trust or profit under *the Government* of the United States." If this act of 1864 is constitutional, and the judgment of the court effective, then the Senate, by this act, has disqualified itself from exercising an express power conferred upon it by the Constitution, viz: that it should be "the judge of the elections, returns and qualifications of its *own* members" (Sec. 5, Art. 1). To illustrate,—Suppose that the people of the State of Kansas, notwithstanding such conviction, believing that it involved no moral turpitude, should, at the next session of the legislature, elect Senator Burton as his own successor, and send him to the Senate as its accredited agent and representative. Would not the Senate have the constitutional and lawful right,—being the sole judge of the election and qualifications of its members,—to admit him, notwithstanding the judgment of the court? If this question be answered in the negative, it follows necessarily that Congress, by the act of 1864, has deprived the Senate of a power expressly delegated and conferred upon it by the Constitution, and the exercise of which has ever been regarded as an essential prerogative of its very existence. If the question be answered in the affirmative, then the act of 1864 is not a law of the United States, "made in pursuance of the Constitution," and is *not* "the supreme law of the land."

Apply another test to the proposition. Suppose Senator

Burton, after having served his term of imprisonment, as fixed by the court, and before the expiration of his term of office, should enter the Senate chamber, and the Senator from Texas should object to Senator Burton exercising any of the duties or functions of a United States Senator, because, "after his election, and during his continuance in office," he had been convicted of a violation of the act of 1864, and, by the judgment of the court, he had been "rendered forever hereafter incapable of holding any office of honor, trust or profit under the Government of the United States." Would such objection be available, unless the Senate, exercising the express power conferred by the last clause of Section 5, Article 1, of the Constitution, "with a concurrence of two-thirds," expelled him?

Suppose the Senate, notwithstanding the judgment of the Court, believing it was wrong should refuse to expel Senator Burton. Could any one question the constitutional right and power of the Senate so to decide? If the Senate, under the power conferred by the Constitution, has such right and power, then the act of 1864 cannot be held to be the *"supreme law of the land."* In the very nature of things, it cannot be "the *supreme law of the land,"* if the Senate has the constitutional power to ignore and disregard the judgment of the court below. If the Senate has not the constitutional right and power to ignore and disregard the act of 1864, and the judgment of the court under it, in passing upon the qualifications of its members, it must be upon the theory alone that Congress, by the act of 1864, had the power to suspend and render inoperative Section 5, Article 1, of the Constitution of the United States.

The act of 1864, and Section 5, Article 1, of the Constitution, are wholly incompatible, and in irreconcilable conflict. It cannot be that the framers of the Constitution intended, by *express* grant, to confer upon *each* House the power to be the sole judge of the qualification of its *own* members, and, by *implication,* to confer the power upon both House and

Senate, by concurrent action, by statute, to disable and disqualify *each* House from exercising the powers thus *expressly* conferred.

In all of the debates in the Constitutional convention, such a contingency was not considered. Evidently, by the *express* grant conferred by the Constitution, the intention was to lodge the power in *each* House, to the exclusion of the other, upon the theory that, "if lodged in any other than the legislative body itself, its independence, its purity, and even its existence and action might be destroyed, or put into imminent danger. No other body but itself can have the same motives to preserve and perpetuate these attributes; no other can be so perpetually watchful to guard its own right and privileges from infringement, to purify and vindicate its own character, and to preserve the rights and sustain the free choice of its constituents. Accordingly, the power has always been lodged in the legislative body by the uniform practice of England and America."

The identical question was decided by Mr. Justice Brewer, when on the supreme bench of Kansas, in the case of State *vs.* Gilmore, 20 Kan., 554, in which was under consideration a section of the Constitution of the State of Kansas, exactly similar to the first clause of Section 5, Article 1, Constitution of the United States. He said:

"The Constitution declares, Article 2, Section 8, that 'Each House shall be judge of the elections, returns and qualifications of its own members.' This is a grant of power, and constitutes each House the ultimate tribunal as to the qualifications of its own members. The two Houses acting conjointly do not decide. Each House acts for itself, and by itself; and from its decision there is no appeal, not even to the two Houses. And this power is not exhausted when once it has been exercised, and a member admitted to his seat. It is a continuous power, and runs through the entire term. At any time, and at all times during the term of office, each House is empowered to pass upon the present qualifications of its own members. By Section 5 of the same Article, acceptance of a federal office vacates a member's seat. He

ceases to be qualified, and of this the House is the judge. If it ousts a member on the claim that he has accepted a federal office, no court or other tribunal can reinstate him. If it refuses to oust a member, his seat is beyond judicial challenge. This grant of power is, in its very nature, (and so as to any other disqualification), exclusive; and it is necessary to preserve the entire independence of the two houses. Being a power exclusively vested in it, it cannot be granted away or transferred to any other tribunal or officer. It may appoint a committee to examine and report, but the decision must be done by the House itself. It, and it alone, can remove. Perhaps, also, it might delegate to a judge or other officer outside its own body power to examine and report upon the qualifications of one of its members. But neither it, nor the two houses together, can abridge the power vested in each House separately of a final decision as to the qualifications of one of its members, or transfer that power to any other tribunal or officer. And an act which purported to grant to the District Court power to remove from office must be construed as not embracing members of the legislature; or if its language specifically names, or necessarily includes them, then as to them the act is unconstitutional."

Again, in the case of State *vs.* Tomlinson, 20 Kan., 703, Chief Justice Horton, Mr. Justice Brewer concurring, said:

"Within certain constitutional restrictions, the executive, legislative and judicial powers of the state, are independent and supreme; and neither has the right to enter upon the exclusive domain of the other. We should be passing beyond the limits of our own power to judge of the election or qualification of a member of the legislature; and as the constitution has expressly confided this power to another body, we must leave it where it has been deposited by the fundamental law."

In the case of Robertson *vs.* State, 109 Ind., 92, it was said that:

"When the Constitution confides to a legislative body the power to judge of the election and qualification of its own members, the exercise of that power belongs exclusively to the

body to which it is committed, and so it is not the subject of review in the courts, or by any other body."

State *vs.* Baxter, 28 Ark., 129.

It is well settled that Section 5, Article 1, providing that "Each House shall be the judge of the elections, returns and qualifications of its *own* members," confers upon "*each* House" powers of a judicial nature,—in the exercise of which its decision is conclusive, and not subject to review by the courts.

People *vs.* Mahoney, 13 Mich., 482.

In the case of Dalton *vs.* State, 43 Oh. St., 680, the Court said:

"The jurisdiction of each House to decide upon the election, returns and qualifications of its own members is supreme and exclusive."

In Cooley on Constitutional Law, (5th ed., p. 753), it is said that:

"Wherever the Constitution has prescribed the qualifications of electors, they cannot be changed or added to by the Legislature, or otherwise than by an amendment of the Constitution."

See also the following New Jersey cases:

Allison *vs.* Blake, 57 New Jersey Law, 8-11 (1894).
Kimball *vs.* Hendee, 57 New Jersey Law, 207 (1894).

In the case of Gibbons *vs.* Ogden, 8 Wheat., 1, 188, Chief Justice Marshall said:

"The enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said."

If the act of 1864 is the "supreme law of the land," by it Congress has surrendered the express grant of power that

each House shall be the judge of the qualifications of its *own* members, and delegated the power thus conferred to the judiciary. Under the authorities cited *supra*, this express grant of power is exclusive in each House, and cannot be delegated,—for, as said by Mr. Justice Brewer in the case of State *vs.* Gilmore, 20 Kan., 554:

"It is a continuous power, and runs through the entire term. At any time, and at all times during the term of office, each House is empowered to pass upon the *present* qualifications of its *own* members. * * * This grant of power is, in its very nature (and so as to any other disqualifications) exclusive; and it is necessary to preserve the entire independence of the two Houses. Being a power exclusively vested in it, it cannot be granted away or transferred to any other tribunal."

If, therefore, the Senate has *now* the power to pass upon the alleged disqualification, as it certainly has under the Constitution, the act of 1864 is not the "supreme law of the land," and was not passed "in pursuance of the Constitution of the United States," and is absolutely null and void. In order to be "the supreme law of the land," the Senate, the House, the Courts, and every person, must yield obedience to its mandates, and the Senate is conclusively bound, by the judgment of the court below, that Senator Burton is "rendered forever hereafter incapable of holding any office of honor, trust or profit under the government of the United States;" and, although a member of the United States Senate, that body can do no act in the premises but register the judgment and mandate of the court.

A jury of twelve men has found Senator Burton disqualified, and rendered him hereafter forever incapable of holding "the office of United States Senator," and the Senate has had no voice in the matter, although its constitutional power "is a continuous power, and runs through the entire term," * * * and it is "empowered," by the Constitution, "at any time and at all times," to "pass upon the present qualifications of its own members."

But there is another view of the question which clearly demonstrates that the act of 1864 is in irreconcilable conflict with the Constitution, and that it is not the "supreme law of the land." It is provided by the last part of the first clause of section 5, article 1, Constitution of the United States, that:

"A smaller number may adjourn from day to day, and *may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each House may provide.*"

The sentence and judgment of the court below is that Senator Burton shall "be imprisoned for the period of six months in the county jail at Ironton, in the County of Iron, and State of Missouri." Senator Burton, during the six months' imprisonment, is the accredited agent and representative of a sovereign State, in the Senate of the United States. The Senate, with the exclusive power conferred by the Constitution of the United States to judge of his qualifications, and, "with the concurrence of two-thirds," to expel him, has not acted. The presence of Senator Burton in the Senate is necessary to make a quorum, and, without his presence, a quorum cannot be secured. The Senate has the constitutional power to "compel the attendance," but when it comes to exercise this power, it is confronted with the act of 1864, by which this power has been abdicated, and the power delegated to the judiciary to place an insurmountable obstacle in the way of the Senate, in the exercise of its constitutional prerogative.

"Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power, and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it." (U. S. *vs.* Harris, 106 U. S., 636, cited *supra.*)

If the act of 1864 is the "supreme law of the land," it must be held to be paramount to the Constitution, and that great instrument the "baseless fabric of a dream." The act of 1864 is aimed at the conduct of "the *Senator*." It fixes his status, provides what he may *not* do "during the continuance of his term of office," and defines his disqualifications. It prescribes a rule of action for "each House," which, if "the supreme law of the land" subordinates to its mandates three clauses of section 5, article 1, Constitution of the United States, viz:

First: Each House shall be the judge of the qualifications of its *own* members.

Second: Each House may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may prescribe.

Third: Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

We will apply another test. Under the act of 1864, the judgment of conviction renders Senator Burton "forever hereafter incapable of holding any office of honor, trust or profit under *the Government* of the United States." If the act of 1864 is constitutional, and "the supreme law of the land," the judgment must necessarily, of itself, operate to vacate the office of Senator Burton the very moment it was rendered. It makes no provision for any action on the part of the Senate to rid itself of the convicted Senator. The Constitution (Sec. 5, Art. 1) provides that:

"If vacancies happen by resignation *or otherwise* during the recess of the Legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies."

In the eye of the law, an office is "vacant" "whenever it is unoccupied by a legally qualified incumbent, who has a *lawful right to continue therein until the happening of some future event.*"

If the judgment of the court below operates to create a "vacancy," then clearly the executive of Kansas has the constitutional power (Sec. 5, Art. 1, Constitution) to fill such vacancy until the next meeting of the legislature. Suppose he should do so. Would not the Senate have the constitutional power, notwithstanding the act of 1864, and the judgment of conviction thereunder, to determine for itself whether the judgment created a vacancy, and whether or not Senator Burton was disqualified to further hold the office, regardless of the judgment? If this question be answered in the affirmative, then upon what theory can it be contended that the act of 1864 was passed in pursuance of the Constitution, and is "the supreme law of the land"?

In the case of Kilbourn *vs.* Thompson, 103 U. S., 190, Mr. Justice Miller, speaking for this Court, said:

"It is believed to be one of the chief merits of the American system of written constitutional law that all the powers intrusted to government, whether state or national, are divided into the three grand departments,—the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of the branches shall not be permitted to encroach upon the powers confided to the others, but that *each* shall, by the law of its creation, *be limited to the exercise of the powers appropriate to its own department, and no other.* * * * In the main, however, that instrument,—the model on which are constructed the fundamental laws of the States,—has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of powers to the executive, the legislative and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by the other."

Under the act of 1864, Congress has attempted to delegate to the judiciary the power to determine whether a Senator has violated his obligation, *as such*, and if found guilty, to imprison him, and disqualify him from ever "hereafter holding any office of honor, profit or trust under *the government* of the United States."

If Congress can thus delegate the power of each, or either, House to the judiciary, then the Senate could do so, without the concurrence of the House, for the power conferred by the Constitution, so far as the *Senator* is concerned, is vested exclusively in the Senate by the Constitution.

There is another view of the act of 1864 which, by analogy, would seem to be conclusive of the contention that it is unconstitutional.

It is provided by section 4, article 2, of the Constitution that:

"The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors."

The maxim of English constitutional law—that the "King can do no wrong"—has no application to our system and theory of government. It can not apply to the President, "because the Constitution admits that he may do wrong, and has provided, by the proceeding of impeachment, for his trial for wrong-doing, and his removal from office if found guilty."

Would any one seriously contend that the act of 1864 could, under the Constitution, be made applicable to the President of the United States? There is no express or implied power in the Constitution for any such legislation. It would be in conflict with the spirit and genius of our institutions. And yet, in a sense, the Senate is a part of the executive power of the government. The President has power to make treaties, "provided two-thirds of the Senators present concur." The President may "nominate, and, by and with

the consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, etc." The powers of the President are limited and circumscribed, except with the "advice and consent of the Senate."

It is said in the Federalist, vol. 2, p. 856, that:

"The Senate is an independent branch of the Legislature,—a court for trying impeachments, and *also a part of the executive*, having a negative in the making of all treaties, and in appointing all officers."

The Constitution prescribes the qualifications of the President, the same as it does those of the Senator. "Judgment in cases of impeachment shall not extend further than to removal from office, and the disqualification to hold and enjoy any office of honor, trust or profit under the United States, etc." Neither the Senate nor the House is the judge of the qualifications of the President, as in case of their *"own members."* Has Congress the power, either express or implied, to superadd to the qualifications of the President? Would Congress have the power, under the Constitution, to make *any* act of the President a statutory offense, punishable by fine and imprisonment, and disqualification to hold office? And yet, there is more warrant for such a law in the Constitution than there is for the act of 1864. The President may be impeached. The Senator may not be. The Senator may be expelled, "with the concurrence of two-thirds" of the Senators, whether guilty of any crime or not. "The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for *and* conviction of treason, bribery, or other high crimes and misdemeanors."

It may be conceded that, under Section 3, Article 3, of the Constitution, "Congress shall have the power to declare punishment of treason, etc.," but beyond that, and the judgment following impeachment (Section 3, Article 1, Constitution), it may no go in prescribing penalties against the President.

The Constitution has created the three co-ordinate departments of the government, and the limitations and restrictions are immutably fixed as to each by the Constitution. The Senator cannot be impeached, because he is a member of the only constitutional tribunal created for that purpose, but, as a substitute for impeachment, he may, "with the concurrence of two-thirds" of the Senate, be expelled.

It will doubtless be said that a Senator is amenable to the law, and that the fact that he is Senator does not give him immunity. That is unquestionably true. He may be arrested and convicted of murder, robbery, arson or larceny, or any other statutory crime. So may the President, or a Justice of the Supreme Court. A State, under its reserved power, may prosecute any one for murder,—the President,—a Senator,—a Justice of the Supreme Court,—and so may the federal government, under any statute passed in pursuance of the Constitution. Section 6, Article 1, by implication, if not expressly, so provides. But there is a marked distinction between the violation of a criminal statute by *the man* and by *the Senator*. If the act of 1864 was intended to discipline the Senator, it divests the Senate of its constitutional prerogative. If it was intended for the purpose of protecting the departments from the insidious influence of the Senator, it cannot accomplish that result by usurping the constitutional power of each House.

The act of 1864 is wholly unlike the act of Congress under consideration by this Court *in re* Chapman, 166 U. S., 664, but in which it was conceded by Chief Justice Fuller (p. 669):

> "The right to expel extends to all cases where the offense is such as, in the judgment of the Senate, is inconsistent with the trust and duty of a member."

It cannot be said in this case, as in that, that the act of 1864 was "necessary and proper for carrying into execution the powers vested in Congress, and in each House thereof" (166 U. S. 671), for, in commenting on the resolution to

expel William Blount from the Senate, in July, 1797, Mr. Sergeant says, in his work on Constitutional Law (2nd ed., p. 302):

"In the resolution the Senate declared him guilty of a high crime and misdemeanor, though no presentment or indictment had been found against him, and no prosecution at law was ever commenced upon the case. *And it seems no law existed to authorize such prosecution.*"

"The two Houses of Congress have several times acted upon this rule of law," says Chief Justice Fuller (166 U. S., 670), "and the cases may be found, together with debates on the general subject, in both Houses, of great value, in Smith's Digest of Decisions and Precedents, Senate Document No. 278, 53rd Congress, 2nd Session."

It will doubtless be contended that Senator Burton is not disqualified by the judgment of the court from holding the office of United States Senator, for the reason that the office of United States Senator is not an "office of honor, trust or profit under the *Government of the United States.*" Mr. Story, in his work on the Constitution, vol. 1, sec. 793, p. 559, referring to the attempted impeachment of Senator Blount, says that a question arose "upon an impeachment before the Senate in 1799, whether a Senator was a 'civil officer' of the United States, *within the purview of the Constitution*, and it was decided by the Senate that he was not; and the same principle must apply to the members of the House of Representatives. This decision, upon which the Senate itself was greatly divided, seems not to have been quite satisfactory (as it may be gathered) to the minds of some learned commentators. The reasoning by which it was sustained in the Senate does not appear, but it was probably held that 'civil officers of the United States' meant such as derived their appointment from and under the national government, and not those persons who, *though members of the government*, derived their appointment from the States, or the people of the State."

The act of 1864 uses the words "under the *government* of the United States." Is not the Senate a part of the *government* of the United States? Section 1, article 1, of the Constitution provides that:

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 3, article 1, provides that:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years."

Is not the office of Senator one of "profit," under *the government* of the United States? The question is answered in the affirmative by section 6, article 1, Constitution, which provides that:

"The Senators * * * shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States."

If, under the judgment of the court below, he is "rendered forever thereafter incapable of holding *any* office of * * * *profit* under *the government* of the United States," may the Treasurer of the United States continue to pay to Senator Burton "compensation" for his services, *as such*, until the expiration of his term as Senator? It is true that the Senator is chosen by the State, and is its accredited representative in the Senate, but the *office* of Senator is created by the Constitution, and the people—not the States—created the Constitution. The preamble to the Constitution provides that:

"We, the people of the United States, * * * do ordain and establish this Constitution for the United States of America."

By that Constitution was created *a government*, with three co-ordinate branches,—the legislative, the judicial and the ex-

ecutive,—and every office necessary, expressly or by implication, to constitute either branch of the government is an "office of honor, profit or trust" under that government.

A State cannot superadd qualifications of a Senator to those prescribed by the Constitution of the United States, so that, where a State constitution provided that judges of the Supreme Court should not be eligible to any office of public trust or profit in the United States during the term for which they were elected, one who had been elected Judge of the Supreme Court for a term of nine years, but resigned the office, and was subsequently, and during the terms for which he was elected, elected Senator, was held entitled to his seat.

In re Trumbull, Taft Elec. Cases, p. 148.

One who is an inhabitant of a State at the time of his election as Senator, having the other qualifications prescribed by the Constitution, is eligible to a seat in the Senate.

Ames, Taft Elec. Cases, p. 317.

A State, therefore, has no voice whatever, under the Constitution, in prescribing the qualifications of the Senator. The Senator must be chosen in the manner prescribed by the Constitution. The Senate, under the Constitution, as has been shown, becomes a part of the executive branch of the government. Treaties cannot be made without its consent. "Ambassadors, other public ministers and consuls, Judges of the Supreme Court, and all other officers of the United States, etc.," can only be appointed "by and with the consent of the Senate." Without the active co-operation of the Senate, the wheels of "government" would stop.

It is provided by Section 3, Article 6, of the Constitution, that:

"The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, *to support this Constitution;* but no religious test shall ever be

required as a qualification to any office or public trust under the United States."

"It has been asked (Rawle on Const., p. 191) why it was thought necessary that the State magistracy should be bound to support the Constitution of the United States, and unnecessary to impose an oath on the officers of the United States in favor of the State constitutions. The reasons assigned (as one of many) by the authors of the Federalist is that the members of the general government will have no agency in carrying the State governments into effect, but the members of the State governments will have an essential agency in giving effect to the general government.

The answer is a solid one. An official oath ought to be confined to the duties of the office. * * * An officer appointed under the authority of the United States is to perform only those duties which emanate from it; his obligation is limited by that authority, which, as repeatedly heretofore observed, is not controlled by the constitutions of the several States."

The Senator is not required to take an oath to support the Constitution of the State. Therefore, can it be claimed, with any degree of reason, that a Senator does not hold an "office of honor, profit or trust under *the government* of the United States," and that the judgment of the court below does not disqualify Senator Burton from continuing to hold the office? Was that not the clear and manifest intention of Congress by the act of 1864? Is it fair to assume that Congress intended, by that act, to disable a Senator convicted of its violation "forever thereafter from holding any office of honor, profit or trust under *the government* of the United States," and *as Senator*, exclude him from its operation, and effect, and permit him, during his term of office as Senator, to assist in making treaties, and consenting to the appointment of officers to hold office that he was himself disqualified from holding?

It will doubtless be conceded that the judgment of conviction, if the act of 1864 is valid, forever disqualified Senator Burton from holding the office of judge of any federal court; yet, if it does not affect his status as a Senator, then

he may consent, *as Senator,* to the appointment of Judge, at the same time not eligible himself to the position. He may, *as Senator,* be a member of the impeachment tribunal before which may be tried the President of the United States, and his vote may be the one vote necessary to remove the President from office, and disqualify him "to hold and enjoy any office of honor, trust or profit under the United States;" and yet he himself be disqualified, under the act of 1864, from holding any office under "the *government* of the United States," except that of Senator, if the judgment does not disqualify him as such.

We desire to specially call the attention of the Court to the language of the statute, viz: "office of honor, profit or trust under *the government* of the United States." Under the clause in the Constitution (Sec. 3, Art. 1), referring to the judgment in cases of impeachment, the language used is "disqualification to hold and enjoy any office of honor, trust or profit under the *United States.*"

There is a broad distinction between "*the government* of the United States" and the "United States." It will not be contended, we think, that "*the government* of the United States" does not include the Senate of the United States, for the Senate is as essential to our theory of government as the executive or judiciary. In fact, a more important part of *the government* than the heads of departments.

Senators and Representatives are not amenable to impeachment under the Constitution, because the House is given the sole power to impeach, and the Senate the "sole power to try all impeachments;" and hence some commentators on the Constitution have reached the conclusion that a Senator was not a "civil officer of the United States."

But let it be conceded, for the purpose of the argument, that a Senator is not a "civil officer of the United States," but an officer of a sovereign State, because he is chosen by the State Legislature, and derives no authority from the United States; then he is responsible "to the power that gave him authority, and not to the government of which he is

part, and which could give him no authority;" and Congress would have no constitutional power, express or implied, *by legislation*, to control his actions or conduct *as Senator*.

If the Senator is a State officer, and the act of 1864 is constitutional, then Congress would have the power to make the same applicable to the Governor of each sovereign State. Suppose the act of 1864 read: "No Senator, no Governor, etc., of any State, after his election, and during the continuance of his term, etc.,"—there is no apparent reason why it would not be as valid, when invoked against the "Governor" as when invoked against the "Senator," *if* the Senator is a State officer, and *as such* does not hold "any office of honor, profit or trust under *the government* of the United States."

In the case of Comm. of Kentucky *vs.* Dennison, 24 How. (U. S.), 107, Chief Justice Taney said:

"And we think it clear that the federal government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it. * * * It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal."

If, therefore, a Senator is not an officer of the United States in the sense of the Constitution, clearly he may not be coerced, or punished for his refusal to obey the requirements of an act of Congress relative to the discharge of his duties as United States Senator.

U. S. *vs.* Germain, 99 U. S., 510,
U. S. *vs.* Mouat, 124 U. S., 307,
U. S. *vs.* Smith, 124 U. S., 532,
In re Greene, 134 U. S., 377,
McPherson *vs.* Blacker, 146 U. S., 35-36.

As the accredited agent and representative of a sovereign State in the Senate of the United States, while he is amenable

like every other citizen, to the laws of the land, yet, *as Senator,* and in the discharge of his official duties, he is responsible alone to the Senate, and the constituency he represents. The House of Representatives, neither alone nor conjointly with the Senate, can prescribe for him a rule of action.

But for the purposes of this case, it is quite immaterial whether the Senator is a State officer, or, *as such,* holds an "office of honor, profit or trust under the government of the United States." In either case, the act of 1864 is not "necessary or proper for carrying into execution" the express grants of power conferred by the Constitution, and is not, and in the very nature of things cannot be, "the supreme law of the land."

Evidently the Senate of the United States, almost from the date of its creation, has entertained the conviction, disclosed by many precedents, that it had the constitutional power to punish its own members for "high crimes and misdemeanors," or any dereliction of duty, in the absence of a criminal statute on the subject (as in the case of Senator Blount), and before a conviction in the courts of a violation of a criminal statute (as in the case of Senator Smith).

If, therefore, it be conceded, as we think it must be, that, by express grant, the Senate had the constitutional power to punish Senator Burton for doing those things prohibited by the act of 1864, in the absence of such statute, that power is exclusive, and the act of 1864 was neither "necessary or proper for carrying into execution" such express grant of power.

No one, we think, will seriously contend that there is in the Constitution any *express* authority for the act of 1864, and it can only be justified upon the theory that it is "necessary and proper" legislation, to effectuate the powers *expressly* granted. It cannot be justified upon the theory that it was "necessary and proper" in order that the departments might be protected from the undue influence of the Senator, for the Senate has the *express* power, conferred by the Constitution, to control the actions of the Senator, by expulsion if

necessary, "with the concurrence of two-thirds;" and, in inflicting such punishment, the concurrence of the House is not required. Indeed, the interference or voice of the House is *expressly prohibited.*

The act of 1864 is not "appropriate" legislation to accomplish the apparent purpose and design of Congress, for the manifest reason that if the Senator is an officer of the government of the United States, the judgment of the court below forever hereafter renders Senator Burton "incapable of holding *any* office of honor, profit or trust under *the government* of the United States;" but the Senate *may*, under the Constitution, *ignore* and *reverse* that judgment, by holding him, not only qualified, but a suitable and proper person to continue to hold and discharge the duties of the office of Senator of the United States during the term for which he was elected.

If the Senator is not an officer of the United States, but of the State, and in disabling Senator Burton, by the judgment, from holding any "office of honor, profit or trust under *the government* of the United States," he is not rendered ineligible to hold and discharge the duties of United States Senator, the Senate *may*, in the exercise of its constitutional prerogative, ignore the judgment of the Court, and permit a Senator, *who cannot be recalled by the State*, to continue to discharge the functions of that great office, although forever rendered infamous by the judgment of the Court.

It is not a legitimate answer to this proposition to say that the Senate will not tolerate in its midst a Senator who has been thus discredited. The question is, has the Senate the constitutional right to ignore the judicial proceedings? Such proceedings were not *necessary* to aid the Senate in securing information. "*Each House* may determine the rule of its proceedings, etc."

Kilbourn *vs.* Thompson, 103 U. S., 190.

"Each House" has the power to summon witnesses, and the same power as the courts to enforce its mandates, and

may determine for itself the same question which Congress, by the act of 1864, has attempted to delegate to the judiciary to determine.

In re Chapman, 166 U. S., 661.

If the jury in the Court below had found Senator Burton not guilty, as charged, would such acquittal preclude the Senate from investigating the accusation, and expelling him from the Senate? If this question be answered in the negative, then he may twice be put in jeopardy for the same offense, and the act of 1864 would not be the "supreme law of the land," for the Senate, exercising its constitutional prerogative, would, in not recognizing the judgment of acquittal, ignore and disregard the law under which the judgment of acquittal was rendered. If the question be answered in the affirmative, then necessarily the act of 1864 would be held paramount to the express provision of the Constitution, and the Senate thereby divested of its constitutional prerogative to be the sole judge of the "qualifications of its *own* members," and the constitutional right to expel one of its "*own* members," "with the concurrence of two-thirds." If the Senate has the jurisdiction, under the Constitution, to thus deal with "its *own* members," it is not reasonable to believe that it was ever intended by the framers of the Constitution that the two Houses conjointly could divest the Senate of that power—of that jurisdiction,—and transfer it to any other body or tribunal.

As said by Chief Justice Fuller, *In re* Chapman (166 U. S., 668-669), the Senate "necessarily possesses the inherent power of self-protection;" and, speaking further of the *constitutional* power of the Senate, said:

"Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry, because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. *The matter was within the range of the constitutional powers of the Senate.* The reso-

lutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation, and punishment. *The right to expel extends to all cases where the offense is such as, in the judgment of the Senate, is inconsistent with the trust and duty of a member.*"

It is well settled that a written Constitution must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the Legislature as upon other departments of government and individual citizens, according to its spirit and the intent of its framers, as indicated by its terms. An act violating the true intent and meaning of the instrument, although not within the letter, is as much within the purview and effect of a prohibition as if within the strict letter; and an act in evasion of the terms of the Constitution, as properly interpreted and understood, and frustrating its general and clearly expressed or necessarily implied purpose, is as clearly void as if in express terms forbidden.

And it is equally well settled that:

"Where the means for the exercise of a granted power are given, no other or different means can be implied, as being more effectual or convenient."

Cooley on Constitutional Limitations, 7th ed., p. 98.

"The impeachment of a legislator (Story on Const. Vol. 1, Sec. 795, p. 561) for his official acts has hitherto been unacknowledged, as matter of right, in the annals of England and America.

"A silence of this sort is *conclusive* as to the state of public opinion in relation to the impolicy and danger of conferring the power."

If, therefore, a legislator cannot be impeached, and the Constitution has expressly conferred upon "each House" the power to punish for any official act, does it not follow that Congress has no implied power to directly or indirectly divest either House of its constitutional prerogative, whether the

Senator is an officer of the State or of "*the government* of the United States"?

We do not contend that Senator Burton is not amenable to the law, like every other citizen, or that the fact that he is a Senator absolves him from obedience to the Constitution of the United States, and laws passed in pursuance thereof; but we do claim that Congress has no constitutional power, by legislation, to place any limitations or restrictions upon his official conduct *as Senator*, and make, by force of the statute, such conduct a crime which would not be a crime if he were not a Senator.

The debates in the Constitutional Convention,—the discussions of the Constitution before it was ratified by the States,—the observations of all commentators upon the Constitution,—lead irresistibly to the conclusion that it was never intended to confer any such power upon Congress.

Mr. Jay, in discussing the duties and obligations of the President and the Senate, and the security the people had from fraud and corruption, said: (The Federalist, Vol. 1, p. 357, No. 44).

"With respect to their responsibility, it is difficult to conceive how it could be increased. Every consideration that can influence the human mind,—such as honor, oaths, reputation, conscience, the love of country, family affection and attachments,—afford security for their fidelity."

The power of "each House" to judge of the qualifications of its *own* members, and to establish rules for its proceedings,—to punish members, and, "with the concurrence of two-thirds," expel a member, is not strictly speaking a legislative, but a *judicial* function, and, unless the act of 1864 can be said to be "necessary and proper for carrying into execution" these functions, it is manifestly unconstitutional.

Mr. Madison says that: (The Federalist, Vol. 1, p. 273, No. 48).

"It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. *It is equally evident that, in reference to each other, neither of them ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers. It will not be denied that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned it.*"

In the case of Marbury *vs.* Madison, 1 Cranch, 391, Chief Justice Marshall said that:

"That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designated to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the Legislature are limited and defined; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between governments with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the Legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary

legislative acts, and, like other acts, is alterable when the Legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be that an act of the Legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written Constitution, and is consequently to be considered, by this Court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the Legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts, are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are

reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

The doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet in practice completely obligatory. It would declare that if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written Constitution, would of itself be sufficient in America, where written Constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection."

Mr. Tucker, in his work on the Constitution, (Vol. 1, p. 368), most forcibly says that: "The law necessary to carry into execution a principal power should be plainly ancillary to such power, and it should be enacted, because, without it, or some like means, the principal power would cease to be. No means, so selected, should be for itself as an independent exercise of power, but should be selected *bona fide* by the legislative power as one of the indispensable methods by which the existence of the principal power should be preserved. It must not be enacted to accomplish an end not within the grant of powers, or adopted for some other purpose under the deceptive pretext of being a means to an execution of some granted powers."

See remarks of Chief Justice Marshall, in the case of McCulloch *vs.* Maryland, 4 Wheat., 316, wherein he said that:

"Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the *pretext* of executing its powers, pass laws for the acomplishment of objects not entrusted to

the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

The nature of the employed power exercised as a means must be legitimate; in other words, no power will be employed as a means to an end which is not legitimate; that is, not within the powers granted by the Constitution. The ancillary legislation must be a necessary and proper means to accomplish an end which is clearly constitutional.

This Court, at an early day, in the case of Anderson *vs.* Duan, 6 Wheat., 233,—in discussing the *express* powers conferred by the Constitution upon "*each* House," with reference to its *own* members,—said:

"The truth is that the exercise of the powers given over their *own* members was of such a delicate nature that a constitutional provision became necessary to assert or communicate it. Constituted as that body is, of the delegates of confederated States, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honor or interest of the State which sent him."

It is therefore fair to assume that the *express* power conferred excludes the idea of any *implied* power not necessary and proper for carrying into execution the express power.

In *Ex parte* Yerger, 8 Wall., 101, it was said that:

"The great and leading intent of the Constitution and the law must be kept constantly in view, upon the examination of every question of construction."

If the act of 1864 is sustained, as being within the purview of the Constitution, it will be possible for Congress, by legislation, to deprive "each House" of the powers the framers of the Constitution thought so necessary to preserve, protect and maintain the autonomy of each. By acting with the House of Representatives, and giving its consent to the act of 1864,

the Senate gave to the House a voice in judging as to the qualifications of its "own members," and delegated to the judiciary the power (by fine,—by imprisonment,—by rendering judgment of disqualification), to place an impediment to the free exercise by the Senate of Constitutional prerogatives, wisely intended for its own protection.

The report of the committee of the Senate, *in re* the resolution to expel Senator Smith, of Ohio, charged with being associated with Aaron Burr in a conspiracy against the government, presents, it seems to us, an unanswerable argument against the validity of the act of 1864. Among other things the committee said that:

"By the letter of the Constitution, the power of expelling a member is given to each of the two Houses of Congress, without any limitation other than that which requires a concurrence of two-thirds of the votes to give it effect.

"The spirit of the Constitution is perhaps in no respect more remarkable than in the solicitude which it has manifested to secure the purity of the Legislature by that of the elements of its composition. A qualification of age is made necessary for the members to insure the maturity of their judgment; a qualification of long citizenship to insure a community of interests and affections between them and their country; a qualification of residence to provide a sympathy between every member and the portion of the Union from which he is delegated; and to guard, as far as regulation can guard, against every bias of personal interest, and every hazard of interfering duties, it has made every member of Congress ineligible to office which he contributed to create, and every officer of the Union incapable of holding a seat in Congress. Yet, in the midst of all this anxious providence of legislative virtue, it has not authorized the constituent body to recall in any case its representative. It has not subjected him to removal by impeachment; and when the darling of the people's choice has become their deadliest foe, can it enter the imagination of a reasonable man that the sanctuary of legislation must remain polluted with his presence until a court of common law, with its pace of snail, can ascertain whether this crime was committed on the right or on the left bank of a river; whether a puncture of difference can be found between

the words of the charge and the words of the proof; whether the witnesses of his guilt should or should not be heard by his jury; and whether he was punishable because present at an overt act or intangible to public justice because he only contrived and prepared? Is it conceivable that a traitor to that country which has loaded him with favors, guilty to the common understanding of all mankind, should be suffered to return unquestioned to that post of honor and confidence where, in the zenith of his good fame, he had been placed by the esteem of his countrymen, and in defiance of their wishes, in mockery of their fears, surrounded by the public indignation, but inaccessible to its bolt, pursue the purposes of treason in the heart of the national councils? Must the assembled rulers of the land listen with calmness and indifference session after session to the voice of notorious infamy until the sluggard step of municipal justice can overtake his enormities? Must they tamely see the lives and fortunes of millions, the safety of present and future ages, depending upon his vote recorded with theirs, merely because the abused benignity of general maxims may have remitted to him the forfeiture of his life? Such, in very supposable cases, would be the unavoidable consequences of a principle which should offer the crutches of judicial tribunals as an apology for crippling the Congressional power of expulsion. Far different, in the opinion of your committee, is the spirit of our Constitution. They believe that the very purpose for which this power was given was to preserve the Legislature from the first approaches of infection; that it was made discretionary because it could not exist under the procrastination of general rules; that its process must be summary, because it would be rendered nugatory by delay."

It is true that Senator Smith was then under indictment for treason, but the Constitution (Sec. 3, Art. 3), expressly confers upon Congress the "power to declare the punishment of treason," but such declaration by Congress was not "necessary" for "carrying into execution" the express power of the Senate to judge as to the qualifications of "its own members," and, "with the concurrence of two-thirds," expel a member.

The accusation against Senator Burton has been pending for nearly two years. It is a matter of general public knowl-

edge that Senator Burton, recognizing the proprieties of the situation, being charged with a crime, the conviction of which renders him infamous, has not occupied his seat in the Senate, or participated in its deliberations, and, during all of that time, the sovereign State of Kansas has been deprived of that representation in the Senate of the United States guaranteed to it by the Constitution.

"The Senate of the United States shall be composed of two Senators from each State." (Sec. 3, Art. 1, Constitution.)

And this constitutional guaranty is exemplified and emphasized by the concluding sentence of Article 5, Constitution, which provides that:

"No State, without its consent, shall be deprived of its equal suffrage in the Senate."

The State has no power to recall its accredited representative. He was chosen by the Legislature of Kansas for six years, under the constitutional compact that the Senate was the sole judge of "qualifications of its *own* members," and might expel him, "with the concurrence of two-thirds."

This is an express limitation upon the power of the Senate to deprive a sovereign State of the service of its Senator, chosen as prescribed by the Constitution.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (Art. 10, Amendts.)

Therefore, the State has the constitutional right to be represented in the Senate by its chosen representative, possessing the qualifications prescribed by the Constitution, until the Senate, exercising its constitutional power, shall adjudge him disqualified, or, with the "concurrence of two-thirds," expel him.

Considering the hostility to the Constitution preceding its ratification by the States, and the apprehension of vesting too much power in the Congress, it is doubtful whether it would have been ratified by the States, if it had been supposed that "each House" might, by concurrence of each, surrender its constitutional prerogative to judge of the "qualifications of its own members," and, "with the concurrence of two-thirds," expel a member, or, by legislation, superadd qualifications and disqualifications to which the States had not assented, by the express terms of the Constitution, or could, by legislation, directly or indirectly, deprive a State of representation in the Senate, in any other manner or by any other mode than as expressly specified in the Constitution.

The condition now existing relative to Senator Burton is a persuasive, if not a controlling argument, that the act of 1864 is unconstitutional. The Senator from Kansas can discharge no official duty, except under the shadow of a crime. The Senate has not acted. There is no vacancy, by "resignation or otherwise," and the executive of the State has no power to appoint.

There is still another view of the act of 1864 which would seem to be an unanswerable reason to sustain the contention that it is unconstitutional. It did not require the concurrence of two-thirds of either or both Houses to pass it. It might become a law with the consent of a bare majority of each House.

While the act does not in terms provide for forfeiture of office, or expulsion, it requires a judgment, upon conviction, that the person convicted shall be "rendered forever hereafter incapable of holding any office of honor, profit or trust under *the government* of the United States." The effect of the judgment, *if the act is valid*, is to expel the Senator from the Senate.

Lowe *vs.* Com., 3 Metc. (Ky.), 241.

In his work on the Constitution of the United States, Vol. 1, p. 429, Mr. John Randolph Tucker, speaking of that

clause of the Constitution conferring power on "each House, * * * with the concurrence of two-thirds, expel a member," etc., says:

"This clause is essential to support the autonomy of each House. * * * These powers are similar to those of the two Houses of the British Parliament."

The cases cited, "as well as the reason of the provision, would justify the expulsion of a member from the House where his treasonable and criminal misconduct would show his unfitness for the public trust, and duty of a member of either House. *But expulsion, which is an extreme punishment, denying to his constituency the right to be represented by him, can only be inflicted by the concurrence of two-thirds of the House, and not by a bare majority.*"

"This authority to expel had existed in the House of Commons, * * * and was extended to all cases where the offense clearly unfitted a member for parliamentary duties."

Mr. Blackstone says: (Cooley's Blackstone Com., Vol. 1, p. 163.)

"It will be sufficient to observe that the whole law and custom of Parliament has its original from this one maxim, that 'whatever matter arises concerning either House of Parliament, ought to be examined, discussed and adjudged in that House to which it relates, and not elsewhere.' Hence, for instance, the Lords will not suffer the Commons to interfere in settling the election of a peer of Scotland; and the Commons will not allow the Lords to judge of the election of a burgess; *nor will either House permit the subordinate courts of law to examine the merits of either case.*"

By the act of 1864 Congress accomplishes a result which the Senate may only do "with the concurrence of two-thirds;" and by an act which is "not consistent with the letter and spirit of the Constitution."

Von Holst, in his work on Constitutional Law of the United States, page 102,—speaking of the clause of the Con-

stitution which authorizes the expulsion of a member of "each House," with "the concurrence of two-thirds," says:

"Both Houses of Congress must have been granted every power needed to guard themselves and their members against any impropriety on the part of a member, and to preserve their dignity and reputation among the people. *It is wholly for them to say what conduct they are to regard as dishonorable enough to require expulsion.* An appeal from their decision lies only to the court of public opinion,—a court which brings in its verdict at the elections."

One of the strongest arguments made against the impeachment of Mr. Blount was based upon the theory that it was never the intention of the framers of the Constitution to invest in the House any power or authority to in any manner, directly or indirectly, question the conduct or motives of a Senator, and hence, when the Constitution provided that the House "shall have the sole power of impeachment" it was a negation of the idea that the House could prescribe any rule of action for the Senator, because the manifest intention was to maintain absolute independence of "each House" over its "*own* members," by providing so explicitly that "each House" should be the judge "of the qualifications of its *own* members," and that "*each* House," "with the concurrence of two-thirds," might expel a member.

The act of 1864 defines a political offense. It is not an attempt to control the conduct of the citizen, but that of the Senator.

It is said in Story on Constitution (Sec. 797) that:

"There are many offenses purely political which have been held to be within the reach of parliamentary impeachment,—not one of which is in the slightest manner alluded to in our statute book. And, indeed, political offenses are of so various and complex a character,—so utterly incapable of being defined or classified,—that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it."

In the enforcement of this law against Senator Burton it is impossible to separate Burton the man from Burton the Senator. The act is aimed at the Senator, and not at the man. The statute is only applicable to him because of the fact that he is a Senator. He is sought to be made amenable to the law because he did that which he was prohibited from doing, "after his election, and during his continuance in office" as United States Senator. In order to convict under the statute, the Government must allege and prove that the act complained of was done after the accused had been elected Senator, and "during his continuance in office." The accusation is against the Senator. Impeachment, under the Constitution, is a presentment or indictment on the part of the House, against "the officer," and not the man, for it is provided that the "judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy an office of honor, trust or profit under the United States." The impeachability of a member of either House (says Mr. Tucker), "therefore is by the House of which he is a member," by virtue *alone* of the power of "*each* House," "with the concurrence of two-thirds," to expel a member. "This power (1 Tucker, 418) in '*each* House' is not only sufficient in the case of such a member, but is totally inconsistent with his amenability to *this* constitutional process of impeachment. If he be a Senator, and be impeachable, the House of Representatives must impeach him by *a majority* of its members, and the Senate by a two-thirds vote convict him, which it might do under the expelling power, without the accusation of the House. But if he be a representative, the House, by a bare majority, may impeach him when two-thirds of that House are essential to expel him, and then the other body, by a two-thirds vote, is to expel a representative from the House, upon an accusation by a bare majority of that House. * * * *This seems to be too absurd to have been within the purview of the framers of the Constitution.*"

In 1 Foster on Constitution, page 572, it is said that:

"The practical construction and the better opinion since has been that neither a Senator nor a member of the House of Representatives can be impeached. *The only remedy for the misconduct of a member of either house of Congress, during his term of office,* is expulsion by his colleagues. This construction seems clear from the letter as well as the spirit of the Constitution. * * * For the removal of an unworthy Senator or Representative, the power of expulsion was conferred upon their respective Houses. *It was not intended to allow either House to regulate the membership of the other.*"

As was so well said in the trial of Senator Blount:

"Is it to be tolerated—can two branches of a legislative body dwell together under the Constitution in peace if one of them has the *constitutional* prerogative to lay its hand upon a member of the other, and force that body to which he belongs to put him on trial for an abuse of that very legislative office to which he was elected?"

Neither Congress, nor even the Parliament of Great Britain, is omnipotent, and in the United States, where written Constitutions are so highly prized, and have been invariably regarded as the limit beyond which legislative power could not extend, no legislative enactment can be permitted to override their solemn mandates. If Congress is at liberty to avoid the behests of the Constitution by such a law as the act of 1864, it would become supreme, and its exposition of that instrument would be final and conclusive.

"The genius and policy of our political institutions, rest upon principles which are at war with the doctrine of legislative omnipotence. Our government is founded upon an express written compact, reduced to exactitude and certainty, expressive of the sovereign will of the people, fixing the limit and marking the bounds of legislative authority and power. The Legislature, instead of being omnipotent, must

yield to its force, submit to its restraint, and bow to its authority. This written compact originated in a spirit of distrust of legislative authority, and from a conviction that legislative omnipotence was but another name for despotism. The evidence of that will rests not in the volition or judgment of those intended to be restricted by its own omnipotent fiat.

Under our form of government, the Legislature is a creature of the Constitution. It owes its existence to that instrument. It derives its power from it, that is, the voice of the people in their original and unlimited capacity, fixing the limits of legislative power. It is the mandate of the creator, directed to and obligatory upon the creature. Its authority is alone sovereign, absolute and supreme.

If the creature of the Constitution can pass judgment upon its obligations, and its judicial determination of its powers be clothed with the attributes of a judicial exposition, authoritative and of controlling force, then legislative omnipotence in this country would exceed that of the British Parliament, to an extent at least commensurate with the force of a written constitutional restriction, which it weighs down by the force of its judicial expositions. While the energies of Parliament are only directed to the exercise of powers unlimited and uncontrolled, legislative power in this country would go further. It would break the fetters the Constitution has wrought out, throw off the restraint it has sought to impose, and annihilate the written will of the people. Parliament never carried its arrogance to such extent. It never, except in days of revolution, nullified the written will of the people it represented, by the force of parliamentary exposition. It never trod under foot a written compact. It never sat in judgment in its own cause, and demanded for its decision in such case respect paramount to Magna Charta."

In conclusion, we bespeak the indulgence of this Court for a few brief suggestions relative to the importance of your

decision. Not only to Senator Burton as an individual—not only to the State of Kansas, whose accredited agent in the Senate of the United States he is—not only to the people of every other State in this Union, each having like representation—not only to the Chief Executive of this great nation—not only the authority and integrity of this Court,—but the whole framework of our government, founded upon the Constitution given us for our guidance by the people of all the States, and the integrity and perpetuity of the Senate of the United States, is menaced if the act of 1864 shall be held to be constitutional.

By the indictment, trial and conviction of Senator Burton, he has been politically destroyed. His hopes, aspirations and honors forever eclipsed, and, whether the law involved in this controversy be held constitutional or otherwise,—if our contention in the other brief filed herein, to which this is supplemental, be true,—he can in no wise wipe from his political escutcheon the fearful scar, or remove from the records of his life the foul blot occasioned thereby. But the wrong inflicted upon him in this matter is in a very large measure personal to himself and the people of the sovereign State who honored him with his great office. His shame and their disgrace can never be fully washed away by any decision of this Court made upon the questions involved in this brief. But the integrity of the Senate, whose sole prerogatives have been usurped by his undoing and their shame, can never again be questioned as to other Senators and other States, if our contention that this law is unconstitutional shall be affirmed by this Court.

Prior to the war of the rebellion the tendency of this Court to hold all departments of the government,—the executive, the judicial and the legislative,—to a strict accountability to the limitations of the Constitution is conceded. But is it not a fact that, in later years, we have been aimlessly drifting from the ancient landmarks so firmly fixed for our guidance and happiness? With a return to our sober second thought, vitalized by the consciousness of grave dangers im-

ment by reason of usurpations and aggressions upon the letter and spirit of the great Charter, should we not be admonished, before it is too late, to place our house in order, as it were, to the end that we may weather the storm that is surely coming? The intelligence, integrity and judicial ability of this Court, present and future, alone must save us, else we will go as all other governments have which had no constitutional restrictions, or, having them, allowed themselves to drift therefrom.

It is doubted if this Court was ever called upon, or ever will be, to pass upon a question of such magnitude, and far-reaching in consequences as this. The integrity and perpetuity of our form of government is menaced, if it shall be held that a jury of twelve men, upon purely a political question such as this, can create a vacancy in the United States Senate. If so, may not Congress in the same way create a vacancy in the Presidency or in this Court? *If the executive power of the government, acting through this law, can invade the Senate of the United States*, and, by and through the instrumentality of a jury, remove a Senator, why may not a like law be passed affecting the members of this Court, and invoked, as in this case, without evidence, and one or all of the members of this Court, at the dictation of one of the Congressional courts inferior to this Court, through like instrumentality, removed from office?

If this law be not a gross violation of the Constitution of this nation, what is to hinder the Congress from passing a like law as to the President, and then, in a prosecution commenced by the political party controlling such Congress, and adverse to such executive, by and through a like jury, remove him from his office?

It is provided by the Constitution that the President shall, "from time to time, give to Congress information of the State of the Union, and recommend to their consideration such measures as he shall adjudge necessary and expedient."

It is no part of the constitutional duty of the President to

do more with reference to measures pending before Congress. It was evidently the intention of the framers of the Constitution that the executive should not trench upon the independence of the legislative department of the Government; that the executive should bring to bear no insidious influence to control the action of any member of Congress on any measure pending before it.

Suppose that Congress, feeling that the executive was becoming too aggressive,—was encroaching upon the independence of the legislative branch of the Government,—should make a law that: "It shall be unlawful for any President, after his election, and during his continuance in office, to directly or indirectly attempt to influence the vote of any member of Congress for or against any measure pending before it;" and that: "It shall be unlawful for any President, after his election, and during his continuance in office, to offer or promise to any Senator the control of any public patronage, as an inducement for his vote for the ratification of any treaty, or the confirmation of the appointment of any officer by the President. That any person violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding $10,000, or imprisonment not exceeding two years, and, upon such conviction, rendered forever thereafter incapable of holding any office of honor, trust or profit under the Government of the United States."

Would such a law be constitutional? Could it be claimed, with any degree of reason, that it was ever the intention of the framers of the Constitution that Congress could thus place limitations and restrictions upon the acts of the President of the United States, and subject him to a prosecution for a violation thereof before an inferior judicial tribunal of the country, and, upon his conviction, fined and imprisoned in a county jail, and thereafter forever disqualified from holding any office of honor, profit or trust under the Government of the United States?

If such a law would not be constitutional and enforcible as against the President, then clearly the act of 1864 is not valid and enforcible as against a Senator,—because the same reasons which may be urged against the law affecting the President are equally applicable against the law affecting the Senator. The Constitution provides the tribunal before which the President may be tried and removed from office; and it provides no less specifically the tribunal which may punish and expel a Senator for dereliction of an official duty. The President may be impeached and removed from office for high crimes and misdemeanors, without being guilty of the violation of any criminal statute, in the same manner as Senator Blount was expelled for high crimes and misdemeanors, when it was conceded that he had not violated any statute of the United States, or of any sovereign State.

Andrew Johnson could thus have been removed from office, without the concurrence of two-thirds of the Senators voting,—for want of which he was not removed, and which is required to remove or expel a Senator. In other words, if our contention be fallacious, then is there any obstacle in the way of those occupying such positions from being destroyed, as Burton has been, if Congress shall elect to lay the groundwork therefor by like legislation? And if so, where is it to end, and what is to become of the constitutional guarantees vouchsafed in that instrument, which in the very nature of such ravishments of its provisions, destroys in time the government handed down to us by our fathers?

These are not wild speculations, but are legitimate, irresistible evidential facts, pointing the way in no doubtful language of "where we are, and whither we are drifting." The appalling consequences of the upholding of such a law, and the declarations by this court of its constitutionality, now invite the terrible possibilities that a mistake in this case at this time by this court, because every infringement of the provisions of that instrument acquiesced in by this court, if such action on the part of this court is even possible, encourages like violations thereof. And the end is not yet.

If the Constitution can thus be indirectly violated, instead of its "remaining firm and immovable as a mountain amid the strife of storms, or a rock in the ocean amid the raging of the waves," it becomes a frail bark which may be rocked by the surges of political strife, be tossed and shattered by every breeze which ambition or avarice may excite, and will become a total wreck whenever it shall have encountered three or four successful mutilations upon the quicksands of legislative precedent.

Respectfully submitted,

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Reply to the Brief of the Government on the Question of the Constitutionality of Section 1782.

It is stated in the brief of the Government (page 59) that "section 1782 applies to individuals. *It is aimed at all persons holding positions of trust or confidence in the service of the* United States." The attempt is made to show that section 1782 places no restrictions upon the "official conduct" of a Senator. It is charged in the indictment (Record, page 5) that the defendant, "*by the influence of his presence and of his office as such Senator*," &c., did do certain acts complained of, and this is the basis of the accusation against Burton. It is a charge against him of *official misconduct* as Senator, and in the consideration of this question it is impossible to separate Burton the man from Burton the Senator. The delegation of power to punish a Senator for official misconduct fixes the tribunal before which he shall be tried, to wit, the Senate. If the act charged against Burton is *not* "official misconduct," his conviction under section 1782 is without warrant. If the act charged *is* "official misconduct," then Congress had no constitutional power to delegate to the judiciary the right to try him for such misconduct, for, as stated, the Senate was the tribunal fixed by the Constitution and there is no express or implied authority in Congress to delegate such power to any other tribunal. The compact in the Constitution between the States and the Federal Government was that the Senator for "official misconduct" could be punished in no other way or by any other tribunal than as prescribed by the Constitution. The President could certainly be tried for "official misconduct" in no other manner and by no other tribunal than as prescribed by the Constitution.

Counsel for the Government contend that the fact that a man is Senator does not secure him immunity for crime committed in violation of a statute. This we concede. The

right of *the States* to punish for violation of the statute was not surrendered to the United States, but was expressly reserved to the States. When the power was conferred—"*each* House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member"—it was upon the condition that "*no State, without its consent, shall be deprived of its equal suffrage in the Senate.*"

If not an *express* prohibition, it is clearly implied that Congress could not lawfully by statute fix a standard of "official conduct," and for a violation of such standard delegate to the judiciary the power to lock the Senator behind prison bars for two years, and "without its consent" deprive a sovereign State "of its equal suffrage in the Senate."

Counsel for the Government admit and concede (Brief, 58) that:

"*With the performance of their constitutional duties as Senators no act of Congress could properly interfere.*"

We respectfully ask, How will it be possible for Senator Burton to perform his constitutional duties while locked up in the county jail at Ironton, Missouri? Counsel say (Brief, p. 62):

"If Congress had intended that the effect of conviction of violating section 1782 should be to unseat a Senator or Representative, it would have said so. * * * *Properly read, the statute leaves the status of a convicted Senator as a member of the Senate to the determination of that body. They may or may not expel him, as they see fit.*"

How would this operate? Senator Burton was convicted on six counts. Under the section 1782 he could have been sentenced for twelve years' imprisonment. Counsel seriously contends that such a sentence would not interfere with him in the discharge of his constitutional duties as Senator, and that his status as Senator was not changed; that the Senate "*may or may not expel him, as they see fit.*" If this conten-

tion is sound, then the State of Kansas, being unable to recall the Senator and there being no vacancy, is absolutely powerless to secure "its equal suffrage in the Senate" during all the time Senator Burton is in prison for a violation of section 1782. The situation is exemplified and emphasized by the motion of learned counsel for the Government to advance this cause, which is as follows, viz:

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1905.

JOSEPH RALPH BURTON, *Plaintiff in Error*,
v.
THE UNITED STATES. } No. 539.

Motion to Advance.

The Solicitor General on behalf of the United States respectfully moves the court to advance the above-entitled cause on the docket for early hearing.

The plaintiff in error, the defendant below, was originally indicted on the 23d day of January, 1904, for violating section 1782 of the Revised Statutes of the United States. His trial and conviction followed in March, 1904, and the case was brought to this court by writ of error. Upon motion of the plaintiff in error the hearing of the cause was advanced. On January 16, 1905, this court reversed the judgment of the District court and remanded the cause, with direction to grant a new trial.

The plaintiff in error was reindicted for violating said section 1782, Revised Statutes, and his second trial and conviction followed in November, 1905.

He was elected United States Senator for the State of Kansas for a term of six years, expiring on the 4th day of March, 1907. He has not resigned, neither has he participated in the deliberations of the Senate since his original indictment on January 23, 1904.

It will thus be seen that the State of Kansas has been without its full representation in the Senate for a period of nearly two years. Under the provisions of the statute, if the judgment of the court below is sustained, the office of plaintiff in error is ipso facto vacated. It is therefore of great importance to the people of the State of Kansas, that this case be determined at an early date. The interests of the General Government will also be subserved by an early hearing.

HENRY M. HOYT,
Solicitor General.

This admission of the counsel for the Government in this motion is hardly consistent with the contention in his brief, that the Senate "may or may not expel him, as they see fit."

But counsel say (Brief, 59), referring to section 1782:

"It does not interfere with the authority of the Senate over its members, because the position of Senator can not be construed to be an office under the Government of the United States within the meaning of that section."

This Government is a constitutional Government. It was created by the Constitution with three co-ordinate branches. Abolish the Senate and we have no constitutional Government. The Senator is an integral part of the Senate. The President is not a "civil officer" of the Government, in the sense of the Constitution providing for his impeachment; however it is provided that "the President, Vice-president, and all *civil officers* of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors," and it is in this sense that Judge Story states that the Senate in the Blount case reached the conclusion that a Senator was not

a "civil officer" of the United States, in a sense that he might be impeached, but as a substitute for impeachment the right to punish or expel "its *own* members" was expressly conferred upon "each House."

Speaking of the judgment of the court below disqualifying the defendant from holding any office, &c., counsel for the Government (Brief, 62) says:

> "It was surplusage for the court to include this declaration of the statute in its sentence. *The disqualification referred to attaches by virtue of the law itself upon conviction.*"

While the Senate is given exclusive power to judge of the qualifications of "its *own* members," and it will be conceded that the Senate could not, by any rule, in expelling a member affix such a disqualification, it is gravely contended that Congress may constitutionally attach such a disqualification to the "official misconduct" of a Senator, which could in no way operate to affect the status of the convicted Senator before the Senate which "may or may not expel him, as they see fit."

It seems, therefore, to be conceded by counsel for the Government that the *effect* of the conviction is to operate as a disqualification for ever "hereafter to hold any office of honor, profit or trust under the Government of the United States," but that in *any* event the status of the convicted Senator, *as Senator*, is not changed. Can such be the law?

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